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# REPORTS OF CASES

RELATING TO THE

## *Duty and Office of Magistrates*

DETERMINED IN THE

## *COURT OF KING'S BENCH,*

FROM

MICHAELMAS TERM, 1828, TO MICHAELMAS TERM, 1829,

BOTH INCLUSIVE.

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BY

JAMES MANNING, Esq. OF LINCOLN'S INN,

AND

ARCHER RYLAND, Esq. OF GRAY'S INN,

BARRISTERS AT LAW.

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VOL. II.

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**J U D G E S**  
**OF THE**  
**COURT OF KING'S BENCH,**  
*During the period comprised in this volume.*

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**CHARLES Lord TENTERDEN, C. J.**  
**Sir JOHN BAYLEY, Knt.**  
**Sir JOSEPH LITTLEDALE, Knt.**  
**Sir JAMES PARKE, Knt.**

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**ATTORNEYS-GENERAL.**  
**Sir JAMES SCARLETT, Knt.**  
**Sir CHARLES WETHERELL, Knt.**  
**Sir JAMES SCARLETT, Knt.**

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**SOLICITORS-GENERAL.**  
**Sir NICHOLAS CONYNGHAM TINDAL, Knt.**  
**Sir EDWARD BURTENSHAW SUGDEN, Knt.**

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A

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OF THE

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IN THE SECOND VOLUME.

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elsewhere than in any part of the British or Irish Channel, within 100 leagues of a certain part of the coast of the county of Essex, having on board divers, to wit, 4300 pounds weight of tobacco, contrary to the form of the statute in that case made and provided; and the said *James Nunn* having been found on board the said vessel at the time of her becoming and being so subject and liable to forfeiture; and the said *James Nunn* having been on the day and year aforesaid, for the offence aforesaid, stopped, arrested, and detained by *W. P.*, an officer of customs, and by him taken and brought into a certain place on land in the United Kingdom, to wit, into the borough of Harwich, in the county of Essex, the said justices had adjudged that the said *James Nunn* had forfeited for his said offence 100*l.*; and that sum not having been paid, the said justices required *W. P.* and *W. B.* to take and convey the said *James Nunn* to the convict gaol at Springfield, in the county of Essex, and to deliver him into the custody of the gaoler of that gaol, and required the said gaoler to take the said *James Nunn* into his custody, and safely keep him until he should pay the said 100*l.*

*Platt*, on a former day, had obtained a rule nisi for a writ of habeas corpus to issue, directed to the gaoler of the convict gaol at Springfield, in the county of Essex, or his deputy, commanding him to bring up the body of the prisoner, *James Nunn*. The rule was granted upon affidavits stating, that at the time when the prisoner was stopped, arrested, and detained, as mentioned in the commitment, he was not found upon the high seas, as alleged in the commitment, but was then on board a certain vessel called the *Mary* and *Eliza*, being the vessel referred to in the commitment; which vessel was then proceeding on her voyage, and sailing on that part of

the coast of Suffolk which lies next the boundaries of the parish of Walton, in the county of Suffolk, but not at a greater distance than 300 yards from the land on the said coast, and in the river Orwell, commonly called the Ipswich Water; that the place where he was so stopped, arrested, and detained, was opposite to the south east side of the town of Harwich, in the county of Essex, where the river is about a mile wide; that the town of Harwich and part of the coast of Essex may be very distinctly seen from the said place, and also that part of the coast of Suffolk which is nearest to the said place; that the civil and criminal jurisdiction of the borough of Ipswich extended from the town of Ipswich down the said river, below Landguard Fort, and that persons were tried at the sessions for the borough of Ipswich, for offences committed upon the said river, at least seven miles distant from the parochial limits of the said borough; that the jurisdiction of the justices of the borough of Ipswich over the said place was public and notorious; and that the whole of the river Orwell which flows from Landguard Fort is within the jurisdiction of the borough of Ipswich. The depositions taken before the justices, which had been returned into this Court by certiorari, stated, that *W. P.*, an officer of customs, being on watch very early in the morning of the 18th of September, 1828, saw the vessel described in the commitment entering the harbour of Harwich, about two miles from the town of Harwich; that he boarded her, and found the prisoner on board.

*Tindal*, *S. G.*, and *Shepherd*, now shewed cause. The grounds on which this rule was obtained appear to be two: first, that there was no evidence to shew that the prisoner was on board the vessel *on the high seas*, and, therefore, that he had committed any offence within the

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words of the statute; and secondly, that assuming such evidence to exist, still the magistrates of the borough of Ipswich, or of the county of Suffolk, were the persons properly having jurisdiction, and not the magistrates of the borough of Harwich. Neither of these grounds can be supported. As to the first point, the information charges that the prisoner was found on the high seas on board a vessel liable to forfeiture, and the commitment states that the justices convicted him of the offence charged by the information. The justices, therefore, have adjudged that the prisoner was found on board the vessel on the high seas, and their judgment is as conclusive of that fact, as it is of the fact, not objected to, that the vessel was liable to forfeiture. But without relying upon the argument that the adjudication of the justices is conclusive upon this point, the depositions furnish a sufficient answer to the objection. It appears from them that the officer of the customs, at a very early hour in the morning, perceived the vessel making for Harwich harbour; that when she had entered the harbour he boarded her, and that he then found the prisoner on board. So that the vessel, when first discovered, was clearly on the high seas, with the prisoner on board; and if so, it is wholly immaterial where she was when she was actually detained. As to the second point, it is unnecessary to consider whether the justices for the county of Suffolk, or for the borough of Ipswich, had jurisdiction over the case or not, as it is perfectly clear that the justices of the borough of Harwich had jurisdiction under the statute 6 *Geo.* 4, c. 108, s. 74, (a) that

(a) Which enacts, that in case any offence shall be committed upon the high seas against that or any other act relating to the revenue of customs, or any penalty or forfeiture shall be incur-

red upon the high seas for any breach of such act, such offence shall, for the purposes of prosecution, be deemed and taken to have been committed, and such penalty and forfeiture to have

being the first place on land into which the vessel was carried.

been incurred, at the place on land in the United Kingdom, or the Isle of Man, into which the person committing such offence, or incurring such penalty or forfeiture, shall be taken, brought, or carried; and in case such place on land is situate within any city, borough, &c., as well any justices of the peace for such city, borough, &c., as any justices of the peace for the county within which such city, borough, &c., is situated, shall have jurisdiction to hear and determine all cases of offences against such act so committed upon the high seas, any charter or act of parliament to the contrary notwithstanding. Provided always, that all offences against that or any other act relating to the revenue of customs committed in any city, borough, &c., shall be deemed and taken to have been committed in the county within which such city, borough, &c., is situate, and as well any justices of such city, borough, &c., as any justices of the county in which such city, borough, &c., is situate, shall have jurisdiction to hear and determine the same.

The other clauses of the same act of parliament, bearing upon the principal case, are these:—

Sect. 3 enacts, that if any vessel or boat, not being square-rigged, belonging in the whole or in part to his Majesty's subjects, or whercof one half of the per-

sons on board, or discovered to have been on board, the said vessel or boat, shall be subjects of his Majesty, shall be found in any part of the British or Irish Channels, or elsewhere on the high seas, within 100 leagues of any part of the coasts of the United Kingdom, or shall be discovered to have been within the said limits or distances, having on board tobacco, &c., then and in every such case the said tobacco, &c., and also the vessel or boat, with all guns, &c., shall be forfeited.

Sect. 49 enacts, that every person, being a subject of his Majesty, who shall be found, or be discovered to have been, on board any vessel or boat liable to forfeiture under that or any other act relating to the revenue of customs, for being found within four or eight leagues of the coast of the United Kingdom, as aforesaid, or for being found, or discovered to have been, within any of the distances or places in that act mentioned, from or in the United Kingdom, or from or in the Isle of Man, having on board, or having had on board, or conveying, or having conveyed, in any manner, such goods or other things as subject such vessel or boat to forfeiture, shall forfeit 100*l.*; and it shall be lawful for any officer of the army, navy, or marines, being duly authorized, and on full pay, or any officer of

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*Platt*, contra. The place in which the prisoner was arrested and detained was within the jurisdiction both of the justices for the borough of Ipswich, and of the justices for the county of Suffolk; and having been taken within one jurisdiction, the officer had no authority to carry him into another, *Ex parte Kite* (a); which is decisive upon that point. Then upon the other point, it is clear from the third (b), forty-ninth (b), and seventy-fourth (c) sections of the 6 Geo. 4, c. 108, that in order to give any justices jurisdiction, the statute requires the offence to have been committed on the high seas; and therefore, unless the committing magistrates in this case had evidence before them that the prisoner was on board the vessel on the high seas, they had no jurisdiction. Now there was no evidence of that kind; there was

customs or excise, or other person acting in his or their aid or assistance, or duly employed for the prevention of smuggling, to stop, arrest, and detain every such person, and to carry and convey such person before two or more justices of the peace in the United Kingdom, &c., to be dealt with as thereafter directed. Provided always, that any such person proving, to the satisfaction of such justices, that he was only a passenger in such vessel or boat, and had no interest whatever either in the vessel or boat, or in the cargo on board the same, shall be forthwith discharged by such justices.

Sect. 80 enacts, that it shall be lawful for any two or more justices of the peace before whom any person liable to be arrested and detained, and who shall have

been arrested and detained for being found, or discovered to have been, on board any vessel or boat liable to forfeiture under that or any act relating to the revenue of customs, &c., shall be carried, on the confession of such person of such offence, or on proof thereof upon the oath of one or more credible witness, to convict such person; and every such person so convicted shall immediately pay into the hands of such justices the penalty of 100*l.*, or, in default thereof, the said justices shall commit such person to any gaol or prison, there to remain until such penalty is paid.

(a) 2 D. & R. 212; 1 B. & C. 101.

(b) Which see set out *ante*, 5, n.

(c) *Ante*, 4, (a).



nothing to shew that the prisoner had committed any offence on the high seas. The only evidence upon that subject was, that the prisoner was on board the vessel when she was seized; but the vessel was not then on the high seas: on the contrary, she was in Harwich harbour, a place within the jurisdiction of other magistrates, and into which she was not carried by the seizing officer, but into which she proceeded in the course of her voyage. For all that appears upon the face of the depositions, the prisoner may have been on shore when the vessel was first discovered by the officer, and may have gone on board after she had left the high seas, and entered Harwich harbour. The conviction assumes, that because the prisoner was on board the vessel when she was seized in the harbour, he must also have been on board her when she was first discovered on the high seas. There is nothing to warrant such an assumption in point of fact, and nothing can be assumed in point of law, to give operation to a penal statute, or to clothe a magistrate with criminal jurisdiction (*a*).

LORD TENTERDEN, C. J.—Two objections have been taken to this conviction; the first, that the prisoner was not found on board the vessel on the high seas, and therefore had committed no offence; the second, that his offence, if any, was committed within the jurisdiction of the magistrates of Suffolk or of Ipswich, and not within the jurisdiction of the magistrates of Harwich. It has been contended, that, although the vessel was found on the high seas, the prisoner was not, and that he may have gone on board her after she had left the high seas. If the fact was so, the prisoner might have proved it; and if he had, he would have given a good answer to the information, because he would have disproved the alle-

(*a*) See *Rex v. All Saints*, *ante*, i. 380; *Rex v. Gilkes*, *ante*, i. 487.

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gation that he was found on board the vessel on the high seas. But the prisoner not having proved that fact, we cannot assume it. Then it is said, that if it is now made to appear before us that the offence was committed, not on the high seas, but in the body of a county, although that would have been good matter of defence to the information, still, as the fact of the offence being committed on the high seas is necessary to give jurisdiction to the magistrates, we ought to inquire into it, notwithstanding the adjudication of the magistrates that the prisoner was found on board the vessel on the high seas. I have great doubts whether that doctrine can be maintained; and whether it is competent for the prisoner to set up that as an objection to the conviction now, which he might have set up originally as an answer to the information upon which the conviction was founded. It is, however, unnecessary to express any decided opinion upon that question now, because the whole matter is before us, and looking at the whole matter, it is perfectly plain to my mind, that the offence in this case was committed on the high seas. It appears from the depositions taken before the magistrates, that the officer being upon the watch at a very early hour in the morning, discovered the vessel coming into Harwich harbour, which must mean, coming from sea; consequently the vessel must have been at sea: and if the prisoner was on board the vessel at sea, he was guilty of the offence of which he has been convicted. The other point depends upon the application of the seventy-fourth section of the statute to this case. It is thereby enacted that if any offence shall be committed upon the high seas such offence shall, for the purposes of prosecution, be deemed and taken to have been committed at the place on land in the United Kingdom, into which the person committing such offence shall be taken, brought, or carried. Now

in this case the prisoner was taken, brought, and carried into the borough of Harwich; so that if the offence was committed upon the high seas, which, upon the grounds already stated, I think it clearly was, the magistrates of Harwich had jurisdiction to convict him, and the objection as to the want of jurisdiction in the convicting magistrates falls to the ground. The case cited of *Ex parte Kite (a)* is entirely different from the present. The conviction in that case stated that the prisoners had been found on board a boat in the harbour of Folkestone, not that they had been found on the high seas, or that they had committed any offence there.

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BAYLEY, J.—The third section of the act of parliament renders any vessel discovered to have been at sea with tobacco on board, under the circumstances therein mentioned, liable to forfeiture; and the eightieth section renders any person discovered to have been on board such vessel liable to be convicted. It is contended that the prisoner in this case was not discovered to have been on board the vessel at sea, but that he was only found on board within the limits of the county of Suffolk, or of the borough of Ipswich; and that the seventy-fourth section ought to be construed as giving jurisdiction to the magistrates of that place only, in which the offender is arrested and detained. But that section gives jurisdiction to the magistrates of the place into which the offender shall be *taken, brought, or carried*; therefore, if the prisoner was *taken* on board the vessel within the limits of the borough of Ipswich, and was *carried* in the vessel out of those limits and into the limits of the borough of Harwich, it is clear that by the words of the act the magistrates of Harwich had jurisdiction to try and convict him. In *Ex parte Kite (a)*, the facts were different:

(a) 2 D. & R. 212; 1 B. & C. 101.

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there the prisoners were taken on board a boat in Folkstone harbour, and were carried first to Folkstone, and afterwards from Folkstone to Dover.

LITLEDALE, J.—In order to convict the prisoner of the offence charged against him, it was necessary to prove two things: first, that the vessel was on the high seas, and secondly, that he was on board the vessel on the high seas. It seems to me that both those things were proved. It is perfectly clear that the vessel, when first discovered, was at sea, within the limits mentioned in the act of parliament, and I think there was reasonable evidence that the prisoner was *then* on board. It has been argued that the prisoner was not seen on board until the vessel had got into the harbour, and that he may have gone on board while she was there, and after she had left the high seas. If that had been proved before the magistrates, it would have been an answer to the charge, and the prisoner could not have been convicted; but no proof of that kind was adduced; therefore, I think there was evidence upon which the magistrates were justified in finding that the prisoner had been on board the vessel while she was on the high seas. Then the only question is, whether the convicting justices had jurisdiction. It seems to me that they had; because by the act of parliament, the justices of the place into which the person committing the offence is carried, have jurisdiction to try it. A vessel on her way up a river, may pass through several jurisdictions; but the justices of the place on land into which the offender is first carried, have jurisdiction to try and convict him: and in the present case that place was Harwich.

PARKE, J.—I am also of opinion that the magistrates of Harwich had jurisdiction in this case. That question

depends upon the construction of the seventy-fourth section of the statute. In order to give the magistrates jurisdiction, two things are necessary; first, that the offence shall have been committed on the high seas, and secondly, that the convicting magistrates shall be magistrates of the place on land into which the person who has committed the offence is carried. Now, first, there was abundant evidence for the magistrates to find that the prisoner was on board the vessel on the high seas. Secondly, though it happened that in the course of conveying the vessel from the place where the prisoner was arrested, (and the place where he was arrested is wholly immaterial,) he passed over a portion of land covered with water, which was within another jurisdiction, still it is plain that Harwich was the first place on land into which he was carried, and that the magistrates who convicted him were magistrates having jurisdiction at that place. It follows that they had jurisdiction over the offence, and therefore this rule must be discharged.

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Rule discharged.


#### The KING v. The JUSTICES of KENT.

AN order of removal from Lenham to Pluckley, in Kent, was served on the 8th of April; the sessions were held on the 15th of April. By the practice of the Kent sessions, eight clear days' notice of an intention to try an appeal must be given. The appeal was not entered at the Easter sessions, but regular notice was given of an intention to try at the July sessions. At the time of the

It is unnecessary to enter and respite an appeal, where the order of removal is served too late to try at the next sessions.

Parish officers ought to be allowed a reasonable time after the service of the order of removal, to consider whether they will appeal or not.

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service of the order of removal, the parish officers of Lenham were informed that Pluckley would appeal. They said, that as there would not be eight clear days for a notice, nothing could be done at the ensuing sessions. At the July sessions the Court refused to hear the appeal, on the ground that it ought to have been entered and respited at the preceding sessions. A rule nisi having been obtained for a mandamus to enter continuances and hear the appeal,

*Bolland* now shewed cause, and cited *The King v. The Justices of Herefordshire (a)*.

Lord TENTERDEN, C.J.—It is quite reasonable that there should be an opportunity of appealing. The parish officers should have time to consider whether they will appeal or not. They may have been misled by the conversation with the parish officers at Lenham, in which the latter observed that they could do nothing the next sessions. It also appears to us to be wholly unnecessary to go through the form and expense of entering and adjourning an appeal which could not, according to the practice of the Court, be then tried.

Rule absolute.

(a) 3 T. R. 504.

The KING v. The Inhabitants of LEW.

The office of  
 assistant over-  
 seer, under 59  
*Geo. 3, c. 12,*  
 is a public annual office within 3 and 4 W. & M. c. 11, s. 6.

UPON appeal against an order of two justices, whereby *William Purbrick*, his wife and children, were removed

If a salary be annexed to the office, the appointment requires a stamp, under 55 *Geo. 4, c. 184*; and service of the office for a year under an unstamped appointment confers no settlement.

from the township of Charlbury to the hamlet of Lew, in the county of Oxford, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

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*Purbrick*, the pauper, being settled in the hamlet of Lew, was, on the 16th day of October, 1826, duly elected by the inhabitants of the township of Charlbury, in vestry assembled, to be an assistant overseer of the poor of the said township, in pursuance of the statute 59 Geo. 3, c. 12, s. 7. The vestry determined that the pauper should perform the duties and receive the salary mentioned in the warrant of appointment hereinafter set forth. On the 18th of the same month he was appointed such assistant overseer by the following warrant, under the hands and seals of two justices (a):—"The township of Charlbury, in the county of Oxford, to wit. Whereas the inhabitants of the township of Charlbury, in the county of Oxford, in vestry assembled in the said township on the 17th day of October, 1826, did nominate and elect *W. Purbrick*, of the township aforesaid, to be an assistant overseer of the poor of the said township, and did fix the yearly sum of 10*l.* as and for the yearly salary of the said *W. Purbrick*, for the execution of the said office: Now we, two of his Majesty's justices of the peace in and for the said township, and in pursuance of the statute in such case made and provided, do hereby appoint the said *W. Purbrick* to be an assistant overseer of the poor of the said township; and we do hereby authorize and empower him to execute and perform the said duties, and to receive the said salary so as aforesaid fixed by the said inhabitants in their said vestry." This warrant of appointment was not stamped. The pauper duly performed the duties of assistant overseer, by virtue of the aforesaid appointment, for one whole

(a) Query, as to the necessity of producing the appointment.

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year from the date thereof, and resided, during that time, in the township of Charlbury. The sessions were of opinion that the warrant of appointment under the hands and seals of two justices did not require any stamp, and they therefore received it in evidence; but they decided that no settlement was gained, subject to the opinion of the Court, first, whether the situation of assistant overseer, described in the warrant of appointment, was an office, the serving of which for a year would confer a settlement; and secondly, if the Court should be of opinion that it was such an office, whether the warrant of appointment, being in writing, required a stamp.

Cooper, in support of the order of sessions. In *The King v. Marsham* (a), Lord Ellenborough says, that the office must be derived from the Crown. Here merely a power is given to the vestry to appoint, but is not compulsory on them. The appointment may be determined at any moment, under the 7th section of 59 Geo. 3, c. 12. In *The King v. Marsham*, the master of a workhouse, appointed under 9 Geo. 1, c. 7, was considered as not executing a public office or charge within 3 W. & M. c. 11, s. 6. [Bayley, J. *The King v. Ilminster* is a case more strongly in point. There the sessions found that the pauper was legally appointed governor of the workhouse in A. at an annual salary, and that the office of governor of the workhouse was a public annual office, and that the pauper served it for a year; and it was held that a settlement was gained in A. (b). Littledale, J. The word office is used two or three times in the act. Bayley, J. Is a hog-ringer an annual office? It has been held to be within the statute (c). Parke, J. There is a

(a) 7 East, 167; 3 Smith, 151. (c) *Res v. Whittlesea*, 4 T. R. 807.

(b) 1 East, 83.



case which shews that the statute of *William* extends to offices subsequently created, as a collector of duties on births and burials. It becomes an office when the vestry have appointed (a).] It is submitted that this was not an annual office. [*Littledale, J.* Is it contended that an annual salary does not make the office annual?] The term "annual" must be understood to mean "by the year," and not "for a year." It has been held that the curate of a sequestered living gains no settlement. *The King v. Over* (b). [*Bayley, J.* There the curate could only be appointed for the time that the living might happen to be under sequestration.] The curate, like the assistant overseer, is appointed with an annual stipend. [*Parke, J.* This is an annual office by the express words of the statute, unless it be determined.] The question is, whether this was an annual office at the time of the appointment. [*Littledale, J.* Many yearly hirings depend upon the will of the parties. *Bayley, J.* A general hiring, subject to being determined by monthly warning, is a yearly hiring.] Another objection is, that this office was not executed by the pauper for himself. No settlement can be gained by being the deputy of an officer, *The King v. Allcannings* (c). Here the pauper was nothing more nor less than a deputy. It will not be contended that it is competent to an assistant overseer to execute a certificate. The appointment is bad for not stating the duties to be performed by the assistant overseer, *Bennett v. Edwards* (d). [*Bayley, J.* There the Court said, that the form of the appointment not being stated, they could not see what the duties of the office were.] The last objection is, that the warrant was not stamped. By 55 Geo. 3, c. 184, schedule, part 2,

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(a) *Rex v. Birham*, 2 Bott,  
 P. L. 157.

(b) *Burr. S.C.* 746.

(c) *Burr. S.C.* 634.

(d) *Ante*, vol. i. 184.

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title Grant, any grant or appointment by his Majesty, his heirs or successors, or by any other person or persons, of or to any office or employment, by letters-patent, deed or other writing, where the salary, fees, or emoluments appertaining thereto shall not amount to 50*l.* per annum, requires a stamp of 2*l.* It is impossible to get out of these words, which are very large. It was contended before the Court below that a permanent appointment only requires a stamp, and that the appointment of assistant overseer was not a permanent appointment. If this be so, the case is stronger upon the other part of the argument, namely, that this is a precarious, not an annual office.

*Chilton* (with whom was *Taunton*) was directed by *Bayley, J.*, to confine himself to the objection upon the stamp. The pauper actually served the office, even if it be considered that the appointment was informal. [*Bayley, J.* Suppose the case had stated that the pauper had been duly elected, but that the magistrates had not appointed, would that have done?] But this is not such an office as requires a stamp to the appointment. The mention of letters-patent shews the class of appointments which were meant to be subjected to a stamp duty. It never could be the intention of the legislature to include parish offices, and thus devote the money raised for the relief of the poor to another purpose; nor indeed was the office in question in existence at the time of the passing of the last stamp act.

BAYLEY, J.—I am of opinion that the pauper held a public office or charge within the meaning of 3 and 4 *W. & M. c. 11*. 'This is a public office. It is to be exercised co-extensively with the parish, and the officer is to be nominated at a public vestry. Then is it an

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annual office? He is to have a yearly salary, and therefore, though he may be removed, he is an annual officer. He is not appointed in the place of any particular officer, subject to a determination of his authority when that officer resumes his functions. There are many cases to shew that this must be considered as an annual office, notwithstanding that it was in the power of the officer to resign, and of the parish, in vestry assembled, to remove him. My difficulty is in meeting the objection under the stamp act, which requires that any grant or *appointment* by his Majesty, or by any other person or persons, of or to any office or employment, by letters-patent, deed or deeds, or other writing, where the salary, fees, or emoluments appertaining thereto shall not amount to 50*l.* *per annum*, shall have a stamp of 2*l.* Will that apply to cases where, upon the face of the appointment, it appears that the office wholly relates to the relief and maintenance of the poor? I cannot think that it was ever intended that such an appointment should be liable to the stamp duty, but I think that we are bound by the express words of the act. By 59 *Geo.* 3, c. 12, s. 7, the inhabitants of any parish in vestry assembled are authorized "to nominate and elect any discreet person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office as shall by such inhabitants and vestry be thought fit; and it shall be lawful for any two of his Majesty's justices of the peace, by warrant under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor, for such purposes and with such salary as shall have been fixed by the inhabitants in vestry; and such salary shall be paid out of the money raised for the relief of

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the poor, at such times and in such manner as shall have been agreed upon by the inhabitants in vestry; and the respective persons so to be appointed, and every person to be so appointed assistant overseer shall be and is hereby authorized and empowered to execute all such the duties of the said office of overseer of the poor, as shall in the warrant for his appointment be expressed, in like manner and as fully, to all intents and purposes, as the same may be executed by any ordinary overseer of the poor, until he or they *shall resign such office*, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer."

LITLEDALE, J.—I am of the same opinion. I cannot get over the stamp act. At the end of the schedule there are several exemptions, and amongst these "all things relating to the poor" might have been inserted; but that is not done. Upon the other point I have no doubt. If an overseer is an officer, an assistant overseer is an officer. It is a public office, because it relates to the poor of a parish. It is an annual office, because it is to endure for a year, unless the party chuses to resign, or is called upon to resign. It was not meant that he should be considered as a deputy.

PARKE, J.—I am of the same opinion.

Order of Sessions confirmed.



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UPON appeal against the order of two justices, whereby *Mary Anne Farrant*, single woman, was removed from the parish of Ely St. Mary, in the Isle of Ely, to the parish of St. Andrew the Great, in the town and county of Cambridge, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

It was proved that the pauper was hired to a Mrs. *Furbank*, as nursery-maid, in the parish of St. Andrew the Great, in Cambridge, and lived there for five months; that she then went to Miss *Henley*, a straw-bonnet maker in the same parish, and asked her if she could give her work in her business; that Miss *H.* said she would for a fortnight or three weeks; that Miss *H.* did give her work for that time, two shillings a week and her board; that during this period the pauper lodged at her uncle's in another parish; that afterwards she went into Miss *H.*'s house, being told by Miss *H.* that she might sleep there, and that when she wanted clothes, she, Miss *H.*, would find them for her; that the pauper had her board but no wages; that after the pauper had thus come into the house to sleep, Miss *H.* told her that she might provide a place for herself elsewhere when she could, and that Miss *H.* repeated this two or three times during her stay; that soon after this the pauper went to visit her mother, who was ill in Ely, leaving some of her clothes behind her; that she asked Miss *H.*'s leave to go, and that Miss *H.* gave her some pocket money; that she stayed with her mother three weeks, and returned without any order from Miss *H.*; that she went a second time to see her mother, had leave for one week, but stayed three, and finally left Miss *H.* three weeks after her return; that she staid altogether about 15 months,

When the Quarter Sessions confirm an order of removal, the validity of which turns upon a question of fact, that fact must be taken to have been found, although the evidence of the fact be stated in a case reserved; and this Court will not disturb such finding if there were any evidence from which the fact might be inferred.

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did the household work, and after having done that went to the straw-bonnet work; and that during the time the pauper remained in the house Miss *H.* had no servant.

If the Court of King's Bench shall be of opinion that a settlement by hiring and service was gained in the parish of St. Andrew the Great under the above circumstances, both orders are to be confirmed; if the Court of King's Bench shall be of a contrary opinion, then both orders are to be quashed.

*Biggs Andrews*, in support of the order of sessions. The second contract was a general hiring. *The King v. Stockbridge* (a), *The King v. Worfield* (b). There the master applied to the servant, here the servant applies to the mistress. There is no other difference between the cases. *The King v. Long Whatton* (c) shews that a contract for a less period than a year preceding the general hiring is immaterial. "You may go" implies a control over the servant. There are two recent cases connected with this subject, but they are distinguishable from the present. In *The King v. Christ's Parish, York* (d), the hiring was as long as the pauper chose to stop. In *The King v. Great Bowden* (e), the hiring was considered insufficient, because the servant was at liberty to leave at any time, and in that case *Bayley, J.* said that if it had not been so found, the Court would have said that it was a general hiring. The pauper served more than twelve months, from which a hiring may be implied, as the law implies a general hiring from the mere fact of service, and it lies upon the other side to shew that there are sufficient circumstances to prove that the hiring was not yearly. *The King v. Long Whatton* (f).

(a) Burr. S. C. 759.

(b) 5 T. R. 506.

(c) 5 T. R. 447.

(d) 5 D. & R. 314; 3 B. & C. 459.

(e) 1 M. & R. 13; 7 B. & C. 245.

*Ante*, vol. i. 39.

(f) 5 T. R. 447.

*Flanagan and Kelly*, contrà. No express hiring for a year is found. An indefinite hiring might furnish ground for inferring a yearly hiring, but the Court of Quarter Sessions have not drawn that inference. Where there is no previous express contract, what the master said must be taken as descriptive of the contract.

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BAYLEY, J.—The justices are to ascertain the facts and draw the proper conclusion. Here they have said that the hiring was for a year. We must see whether there are not premises from which this conclusion may be drawn. The first hiring was for a fortnight or three weeks. Then came the conversation with Miss *Henley*, in which the pauper is told that she may sleep in the house and shall be provided with clothes. Where a servant is to receive clothes, it may be presumed that he is to remain in the service until he has earned his clothes. I think the justices had grounds for finding this to be an indefinite hiring. Miss *Henley* afterwards told her she might get a place elsewhere if she could. But that alone could not vary the already existing contract of general hiring. The leave of absence, if that leave was not contemporaneous with the original contract, could not prevent an indefinite hiring. I cannot say the justices had not premises from which they could come to the conclusion that this was a yearly hiring; and if they had, it is not for this Court to inquire whether they have come to a proper conclusion or not.

LITLEDALE, J.—The Court of Quarter Sessions were the judges of the question of fact, whether or not there had been a yearly hiring. I cannot say they had not any premises from which this conclusion could have been drawn, though from the same premises I believe I should have come to a contrary conclusion.

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PARKE, J.—If it is not necessary for us to state what conclusion we should have come to if the case had been originally presented to us, it is enough to say, that the Court of Quarter Sessions were at liberty to the inference which has been drawn.

BAYLEY, J.—I wish the justices would exercise their own judgment upon matters of fact.

Order of Sessions confirmed (a).

(a) See the next case.

The KING v. The Inhabitants of ST. MARTIN,  
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A, an inn-keeper, said to B. "I have a lad coming in a fortnight, but you may stay till he comes." B. was to have board, lodging, and vails. The other lad came but did not remain. B. continued in the service three years without any thing further passing. The Court of Quarter Sessions are at liberty to infer a general hiring.

*FRANCIS WARD* and *Mary* his wife, and their four children, were removed from Great Bowden, in the county of Leicester, to St. Martin, Leicester; and upon appeal the Court of Quarter Sessions confirmed the order of removal, subject to the opinion of this Court upon the following case:—

*Francis Ward*, the pauper, being then about fourteen years old, went in company with his father to the house of one *Neale*, an innkeeper, in the parish of St. Martin, Leicester, and stated to *Neale* that he had heard that he wanted a lad; *Neale* answered that he had a lad coming in a fortnight, but that the pauper might stay for that fortnight till the other lad came. The pauper was to fill the situation of boots and tap boy. He was to have his board and lodging in the house, and the vails which he might obtain in that employment. At the end of the fortnight the other lad came, but was not engaged by Mr. *Neale*, and the pauper continued in the service without



any thing further passing between him and Mr. Neale, for a period of three years and a quarter, at the end of which time the pauper, hearing that the place of hostler at another inn was vacant, went and engaged it without consulting his master, and removed into it on the following day, *Neale* telling the pauper, that if it was his mind to go he believed he must. The Court of Quarter Sessions found that there was an implied hiring for a year, and confirmed the order.

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*Jeremy*, with whom was *Humfrey*, in support of the order of sessions, was stopped by the Court.

*Denman* and *Reader*, contra. There were no premisses to warrant the conclusion to which the Quarter Sessions have come, but the propriety of which they have submitted to this Court. Unless service without any hiring be sufficient, this order cannot be supported. *The King v. Christ's Parish, York (a)*. [*Bayley, J.* There it was part of the original bargain that the pauper was to stay as long as he pleased.] *The King v. Great-Bowden (b)* is in point. [*Bayley, J.* In that case it was part of the original terms that the pauper should be at liberty to quit.] The same ground exists here. The Court have gone far enough in holding service to amount to a hiring, though a hiring may be reasonably inferred where the service is in husbandry. Here the Court are in possession of the whole history of the transaction. The hiring was merely until another lad should come. There must be a contract of some sort or other. *Gregory-Stoke v. Pitminster (c)*. There, besides four years' service, an actual retainer was proved, and the Court said that there must be an obligation to stay (*d*).

(a) 5 D. & R. 314; 3 B. & C. 459. (c) 2 Bott, P. L. 183.

(b) 1 M. & R. 13; 7 B. & C. 245; (d) *Sed vide* 2 Bott, P. L. 184. *Ante*, vol. i. 39.

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In *The King v. Weyhill* (a) the words were, "Go into *Ned Hill's* place." Here it is not proved what the hiring of the former servant was. It is stated in the case that the pauper received vails; but that is consistent with either species of hiring. The master's saying that if the pauper had a mind to go he believed he must, shews that no contract existed under which the pauper was bound to stay. [*Bayley*, J. Supposing it had been said "Do you want a lad?" and the master had answered "I do," and he had gone into the service?] That would have been a general hiring; but here the answer would have been different; the term of the hiring would have been mentioned. In *The King v. Great Bowden* (a) it was said, "The one is bound to serve, the other to employ, (for a year.) If that is not the understanding, it is not a general hiring, but a hiring for a less period than a year." Here the understanding of the parties is shewn by their acts.

BAYLEY, J.—The Court of Quarter Sessions were warranted in coming to the conclusion they have come to. The pauper applied to the master to know whether he wanted a servant. If he had been then taken, and nothing had been said about the terms, or nothing more than what the law implied, it would have been a hiring for a year. The master gives a reason for making a temporary bargain. "I have another coming in a fortnight." The other lad comes, but he does not suit, and goes away. The pauper continues in the service without any thing further passing. Then is the relation of master and servant created, and for what time? The understanding which exists in the mind of each might be taken into consideration by the justices at sessions; and if they were satisfied that the hiring for a year was

(a) 1 W. Bla. 206.

(b) 1 M. &amp; R. 13; 7 B. &amp; C. 245;

*Ante*, vol. i. 39.

dispensed with only because the other lad was expected, they might take into their consideration what passed at the original treaty; they might infer an agreement to serve upon the terms which the original agreement would amount to, supposing the lad not to be mentioned, or supposing the pauper had been told, generally, that he was to fill the situation of boots and tap boy, and have his board, and lodging, and vails, which would have constituted a yearly hiring. The justices were therefore warranted in inferring that he became a yearly servant. In the case of *The King v. Pendleton (a)*, in which the service was under an unstamped agreement, it was expressly found that no new agreement had been made. This the Court held to be equivalent to nothing having passed. There an express hiring was negatived. So here the justices at sessions were the proper persons to form a judgment as to the footing upon which the pauper remained in the service after it was ascertained that the other boy did not suit the place. They were to draw their own conclusion, and were at liberty to find an implied yearly hiring.

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LITTLEDALE, J.—I think this order must be affirmed. I found my opinion entirely upon the circumstance of there being facts to warrant the finding. I am not prepared to say that I should have come to the same conclusion.

PARKE, J. concurred.

Order of Sessions affirmed.

(a) 15 East, 449.



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The KING *v.* The Inhabitants of ST. ANN'S,  
BLACKFRIARS.

Payment of  
*watch rate* in  
London does  
not confer a  
settlement.

**SOPHIA GYLES**, wife of *John Gyles*, who was absent from her, and their two lawful children, viz. *John*, aged six years, and *Benjamin*, aged two years, were removed from the parish of St. Ann's, Blackfriars, in the city of London, to the parish of Christchurch in the same city. The Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case.

*John Gyles*, the pauper's husband, occupied part of a house in Warwick-lane, in the appellant parish of Christchurch, of the yearly value of 20*l.*, for several months in the year 1821; and during that time he was rated to and paid two quarters' *watch rates* for the ward of Farringdon-Within, in which ward the said house is situated. The city of London is divided into twenty-six wards, and the wards into precincts. The ward of Farringdon-Within contains seventeen precincts; and the house, in respect of which the watch rates were paid by *John Gyles*, is, with regard to ward matters, in St. Ewin's and not in Christchurch precinct. The watch rate is made by the aldermen and common councilmen of each ward, under the authority of the statute 10 *Geo. 2*, c. 22, s. 2, which enacts, "for the better raising and levying of moneys for paying the wages of the watchmen and bea-  
dles, and other charges incident thereto, that the mayor, aldermen and commons of the said city of London, in common council assembled, every year, shall then and there determine and direct what sum and sums of money shall be raised and levied upon each respective ward, for answering the purposes aforesaid; and for raising the said several sums of money, to direct the alderman, deputy, and common councilmen of each and every of the

respective wards in the said city of London and liberties thereof to make an equal rate and assessment upon all and every the person or persons who do or shall inhabit, hold, occupy, or enjoy any land, house, shop, warehouse, or other tenement within their respective wards, (regard being had in making the said rates to the abilities of, and likewise to the rent paid by, the several inhabitants and occupiers so to be rated and assessed). And the alderman, deputy, and common councilmen of each ward of the said city, are hereby authorised and required to make such rate and assessment for their respective wards, in such manner and form as shall be so directed by the said court of common council, which rates or assessments shall be collected quarterly from the several inhabitants or occupiers in each of the said several wards by the several constables for the time being of the several precincts, or by the beades in each of the said respective wards, as the alderman, deputy, and common councilmen of each ward shall direct and appoint; and in case of non-payment, the lord mayor, or the alderman of the ward wherein the premises are situated, may grant a warrant to the collector to levy the same." The form of the watch rates in question (varying the time for which each was respectively made) was as follows:—

*“London.*—A rate and assessment made upon the several persons who inhabit, hold, occupy, and enjoy any land, house, warehouse, or other tenement within the ward of Farringdon-Within, (the precincts of Blackfriars and Monkwell excepted,) for raising money to pay the watchmen and beades appointed for the said ward, and other charges incident thereto, (except the watchmen of the aforesaid precincts,) for one quarter of a year, from the 25th of March to the 24th of June, 1821, pursuant to an act of common council of the year 1820.

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Warwick-lane				
John Gyles		3		

The question for the opinion of the Court of King's Bench is, whether such rate is one of the public taxes or levies within the statute 3 *Will.* 3, c. 11, or any subsequent act, the being charged with and paying towards which confers a settlement on the party so charged and paying.

*Adolphus* and *Brodrick*, in support of the order. The pauper's husband gained a settlement under 3 *W. & M.* c. 11, which enacts, (s. 6,) "that if any person who shall come to inhabit in any town or parish shall be charged with and pay his share towards *the public taxes or levies of the town or parish*, then he shall be adjudged and deemed to have a legal settlement in the same, though no such notice in writing be delivered and published as is hereinbefore required." In *Rex v. Bramley* (a), this Court held that payment of land tax came within the meaning of that act. Lord *Hardwicke* there says, "The great doubt has been whether the legislature did not mean *parochial taxes*; but this has been long gotten over, and the land tax has been holden to be within the act, from the notice of inhabitancy that arises by the party's being assessed and paying it." *Rex v. Mitcham* (b),

(a) Burr. S. C. 75.

(b) Cald. 276.

is to the same effect. [*Bayley, J.* The difficulty is, that this is not a parochial tax, nor collected by parish officers.] The question is, whether this is not sufficient notice that the party is becoming a parishioner.

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**BAYLEY, J.**—Payment of county rates does not confer a settlement (*a*). This is not a parochial benefit; the object of the rate is the benefit of the ward. The principle of every case is, that the parish have notice.

The other Judges concurred.

Order quashed.

*Bolland and Payne* were to have argued against the order.

(*a*) Cases of Settlement, 1; 2 Nolan, 107.

### The KING v. The Inhabitants of MATTISHALL.

**JEREMIAH TAYLOR** and Ann his wife were removed, by an order of two magistrates, from Norwich to Mattishall, in Norfolk. On appeal the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

*Jeremiah Taylor*, on the Sunday morning fortnight before Christmas, 1820, when he was living at Mattishall with his father and mother, was informed that *Joseph Middleton*, a blacksmith living at Wymondham, wanted a lad. *Taylor* went to *Middleton's* the next day, when they agreed that *Taylor* should go on the Tuesday following, and should stay a month upon liking, and that if they liked each other, he should be apprenticed to him for three years. *Taylor* went to *Middleton's* on the

Where money is advanced by the overseers to an infant about to be apprenticed, for the purpose of providing her with clothes, the indenture is void unless approved of by two justices under 56 Geo. 3, c. 139.

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Tuesday following, and continued with him for a month. At the expiration of the month the indenture (a copy of which is annexed) (a), was executed; *Taylor* served under that indenture for three years, living during all that time with *Middleton*. *Middleton*, before the indenture was executed, said the pauper should have some better clothes, and the pauper thereupon applied to the parish officers of *Mattishall*. The parish officers, who are the attesting witnesses to the indenture, agreed to give him 2*l.* at the execution of the indenture to buy clothes, and 2*l.* more for the same purpose at the end of the year. They gave the first 2*l.* to the pauper's mistress, who laid it out for him in the purchase of clothes. At the end of the year the other 2*l.* was paid to the pauper.

*F. Kelly*, in support of the order of sessions. This case depends upon 56 *Geo.* 3, c. 139, s. 11, which, after reciting that the salutary provisions enacted by an act passed in the forty-third year of the reign of her late Majesty Queen *Elizabeth*, intituled "An Act for the relief of the Poor," are frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, is clandestinely provided by parish officers, who are thus enabled to bind out such poor children without the sanction of justices of the peace, enacts, "that after the 1st day of October, 1816, no indenture of apprenticeship, by reason of which any expense whatever shall, at any time, be incurred by the public parochial funds, shall be valid or effectual, unless approved of by two justices of the peace, under their hands and seals," according to the provisions of the said act and of this act. It is said that the introductory part relates to premium only, and that the enacting part is

(a) The indenture was for three years, but in other respects was in the common form.



controlled by the preamble; but if this be an expense incurred by the parochial funds by reason of the indenture, it is within the meaning of the act. It seems impossible to contend that this was not an expense incurred by reason of the indenture.

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*Chitty, contra.* This was a good apprenticeship, *The King v. Arundel*(a). [Parke, J. Nothing turns upon what the law was before the statute.] The mere intervention of the parish officers, and a donation from them, do not deprive the master or the apprentice of their respective rights, *The King v. Leighton*(b). Overseers frequently advance money to parishioners to prevent their becoming chargeable. The parish officers do not here provide a premium or compel the binding. Nor is it found that any expense was incurred by the parochial funds. The case is not within the words or the spirit of the act.

BAYLEY, J.—The order of sessions is right. The enacting part of this statute clearly goes beyond the recital; if it did not I could not say that this money was paid as a premium. It was in fact paid to enable the apprentice to make a better appearance. The boy applies not to the father or mother, but to the overseers; upon which they supply him with 2*l.*, and promise 2*l.* more at the end of the year. The case does not state that they paid the money out of the parochial funds; but they were applied to as overseers, and the presumption therefore is, that the payment was made out of the parish funds; if it were not so, that fact might have been easily set right at sessions. The Court of Quarter Sessions could not have arrived at the conclusion to which they came, if they had not inferred that the payment by the overseers was

(a) 5 M. & S. 257.

(b) 4 T. R. 732.

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made not out of private but out of parochial funds. If that be so, then look to the words of the act. "By reason of which any expense whatever shall, at any time, be incurred by the public parochial funds." The money in question was paid because the master objected to taking the apprentice unless an expense was incurred by the parish. The case, therefore, seems to fall within the act.

LITLEDALE, J.—I am of the same opinion. It is said, that some gentlemen advance money to parishioners out of their own money, to prevent their becoming a burthen on the parish; if that had been so here, the case would have stated that *A. B.* and *C. D.*, being parish officers, advanced the money out of their own pockets.

PARKE, J.—It must be taken to be money advanced by them as overseers on this finding, not out of their own pockets.

Order confirmed.

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The KING v. PHILIP WILLIAMS, Esquire.

Where a mandamus to admit a churchwarden recites that the party was duly nominated, elected and chosen, "not duly elected" is a good return.

IN Trinity term a writ of mandamus issued to *Philip Williams, Esq.* official and commissary of and within the parish of Hornchurch and liberty of Havering-atte-Bower, in the county of Essex, or other competent officer in that behalf, in the following terms:—"Whereas *James Meakins*, an inhabitant and parishioner of Hornchurch aforesaid, in the said county of Essex, was heretofore, to wit, on the 15th day of May last past, duly nominated, elected and chosen into the place and office of churchwarden of the said parish of Hornchurch, to serve in the said place and office for the year ensuing, according to the custom of the said parish, and ought

by you to have been sworn and admitted into the same place and office: And whereas the said *James Meakins*, after such his nomination, election and choice, as aforesaid, did in due manner present and offer himself before you to be sworn and admitted into the said place and office of churchwarden of the said parish of Hornechurch: Yet you, well knowing the premises, but not regarding your duty in this behalf, have absolutely refused and neglected, and yet do refuse and neglect, to swear and admit him, the said *James Meakins*, into the said place and office of churchwarden of the said parish of Hornechurch, without any reasonable cause whatsoever: In contempt of us, to the great damage and grievance of the inhabitants of the said parish, more particularly of the said *James Meakins*: As we have been informed from his complaint made to us in this behalf: We therefore, being willing that due and speedy justice should be done to the said *James Meakins* in this behalf, as it is reasonable, do command you, firmly enjoining you, that, immediately after the receipt of this our writ, you do without delay admit and swear the said *James Meakins* into the place and office of churchwarden of the parish of Hornechurch, in the said county of Essex, together with all the liberties, privileges and franchises, emoluments and advantages, to the said place and office belonging and appertaining: Or that you shew us cause to the contrary thereof: Lest in your default the same complaint should be repeated to us: And how you shall have executed this our writ make known to us at Westminster on Thursday next after the Morrow of All Souls, then returning to us this our said writ: And this you are not to omit, on peril that you may fall thereon. Witness *Charles Lord Tenterden*, at Westminster, the 16th day of June, in the 9th year of our reign. By the Court,

By rule of Court.

*Lushington."*

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To this writ the following return was made :

" I *Philip Williams*, esq. official and commissary of and within the parish of Hornchurch and liberty of Havering-atte-Bower, in the county of Essex, do humbly certify and return to our Lord the King, at the day and place within contained, that the within-named *James Meakins* was not duly elected into the office of churchwarden of the within-named parish of Hornchurch, to serve in the said place and office for the year ensuing, according to the custom of the said parish, as by the within writ is suggested ; therefore I cannot admit and swear the said *James Meakins* into the said place and office of churchwarden of the said parish of Hornchurch, together with all the liberties, privileges, franchises, emoluments and advantages to the said place and office belonging and appertaining, as by the within writ I am commanded.

*Philip Williams.*"

In Michaelmas term *Brodrick* moved to quash this return as insufficient, and cited *The King v. Martin Rice* (a), where it was held that the archdeacon had no power to refuse to swear and admit a churchwarden, that he had no authority to examine, his office being entirely ministerial. He referred also to *The King v. White* (b), and *The King v. Harris* (c). The Court thought the matter could not be properly disposed of by motion, and directed that it should be set down for argument. The case being now called on in the Crown paper,

*Brodrick* referred to Burn's Eccl. Law, 155, where the cases are collected, some of which, it must be admitted, are contradictory. In *Rex v. White*, to a mandamus directed to the archdeacon to swear in a churchwarden,

(a) 1 Ld. Raym. 138.

*Rex v. Simpson*, 2 Stra. 894, and

(b) 2 Ld. Raym. 1379, cited

Selw. N. P. 1069, 7th ed.

and approved upon this point in

(c) 3 Burr. 1420.

he returned "non fuit electus;" upon opening which Mr. Justice *Fortescue* said, "that it was settled and had been often ruled, that the archdeacon could not judge of the election, and therefore the return was ill." Whereupon a peremptory mandamus was granted. It is true that the reporter goes on to say, "but note, it was certainly wrong, for the return was a good return, and has often been made to such mandamus, and actions brought upon the return and tried." [*Littledale, J.* If this return could not be made, the mandamus ought to have been peremptory. *Parke, J.* The return to the mandamus traverses the supposal in the writ. You must argue that the writ would have been good if it had omitted the allegation of an election.] The officer cannot return that the party is not elected. [*Bayley, J.* If the suggestion in the writ had been that the party was not *elected*, the officer could not return that he was not *duly* elected. *Parke, J.* If the fact suggested fails, the foundation of the writ fails.] By this return the officer pronounces a judgment upon the election, which he is not authorised to do. In *Rex v. White* the return was, "not elected." In *Rex v. Harwood* (a) the same return was made; but from the report of the case in 8 Mod. (b), it would appear that the Court awarded a peremptory mandamus, on the ground that it was not competent to the archdeacon to enter into evidence for the purpose of ascertaining the truth of the allegation. [*Bayley, J.* The case is differently reported by Lord *Raymond*, who says (c), "But both my brother *Reynolds* and myself took the return to be good. But upon the importunity of the counsel for *Folbigg*, and pressing the authority of the case of *The King v. White*, and no counsel for the defendant appearing, a rule was made for a peremptory mandamus,

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(a) 2 Ld. Raym. 1405.

(c) 2 Ld. Raym. 1405.

(b) 8 Mod. 380.

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nisi, &c. At which afterwards my brother *Reynolds* and I were much dissatisfied; but the counsel for the defendant at another day coming to shew cause against the rule, we discharged the rule. And the Court not being unanimous, it was ordered to come on again in the paper. But I never heard it stirred again. But there can be no doubt but such a return is good." That is certainly the effect of the case, as reported by Lord *Raymond*; but in *Rex v. Ward* the case is cited from 8 Modern. [*Bayley, J.* Lord *Raymond*, who decided *Rex v. Harwood*, is more likely to be correct than the editor of 8 Modern—a book notoriously inaccurate and of no authority. *Littledale, J.* He is to make such inquiries as to satisfy himself that the person applying is not a mere stranger. *Parke, J.* He exercises no judgment, but merely denies your allegation.] In *Rex v. Harris*, Lord *Mansfield* says, that the commissary has no right to try the question as to which party was duly elected. He cannot try the legality of the votes; and it being urged that non fuit electus was a good return, and that there being two cross writs of mandamus, the defendant did not know which to obey, Lord *Mansfield* and Mr. Justice *Wilmot*, the only Judges in Court, said, that he ought to obey both, and that it was without prejudice to the right of either claimant. [*Bayley, J.* Though the commissary cannot decide upon the election, and thereby bind the parties, he may at his peril return that the prosecutor of the mandamus was not duly elected, and give the opportunity of raising the question, in an action for a false return.] The prosecutor has no interest in questioning this return; for if it is pronounced sufficient, he will immediately bring his action for a false return. His apprehension is, that after bringing an action he may be turned round, by being told that the return is bad in law. [*Parke, J.* The commissary takes it upon himself

to say that the party is not duly elected. This he states, not judicially, but merely as a denial of a fact suggested. If he could not do this, he would be bound to swear any one who tendered himself. *Littledale, J.* The return is, "I am bid to do a thing which there is no foundation for."]

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The Court, without calling upon *Erle*, by whom it was to have been supported,

Allowed the Return.




#### THE KING v. THE INHABITANTS of ROSLISTON.

THIS was an appeal against an order for the removal of *Richard Taylor* and *Catherine* his wife, and one infant daughter, (not christened,) from the parish of St. Michael, in the city and county of the city of Litchfield, to Rosliston, in the county of Derby. The Court of Quarter Sessions for the city and county of the city of Litchfield confirmed the order, subject to the opinion of this Court upon the following case:

"Let him stop what time he will, I will give him satisfaction, if not in money in clothes." The sessions are at liberty to infer that this was not a general hiring.

*Richard Taylor*, the pauper, on the 6th February, 1817, and when about thirteen or fourteen years of age, went with his mother to *Joseph Slater*, a victualler and farmer, living in the parish of Chad, otherwise Stowe, within the city and county of the city of Litchfield. The pauper's mother asked *Slater* if he wanted a boy; he said "Yes." She then asked what wages he would give. *Slater* said, "Let him (the pauper) stop what time he will, I will give him satisfaction, if not in money in clothes." The pauper went into the service a few days afterwards. He looked after the horses, cows and sheep, and attended to the general business of the farm. *Slater* gave the pauper his board, some clothing, and also some

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money at different times; and the pauper continued in such service in St. Chad's parish for thirteen months, when he ran away, because *Slater* beat him. *Slater* never sent after the pauper, nor did the pauper ever offer to return to *Slater's* service; but a few days after he had run away, he went to *Slater's* for his hat, which *Slater* refused to give him. The pauper, on his cross-examination by the respondent's counsel, stated, that at the time of hiring, *Slater* did not say that he (the pauper) might go away when he pleased, or that *Slater* might turn him away when he pleased. After the expiration of a year or more from the original hiring, the pauper's mother went to *Slater's* house to make an agreement, but he was out, and no new agreement was made. In 1827, and before the pauper was removed, and whilst the pauper, his wife and child, were living in St. Michael's parish, he applied to the overseer of the parish of St. Chad, otherwise Stowe, for relief, and, after being examined as to his settlement, was twice relieved by such overseers.

The Court of Quarter Sessions were of opinion that there was no general hiring in the parish of Saint Chad, otherwise Stowe.

*Shutt*, in support of the order of sessions. There can be no general hiring where time is mentioned. General and indefinite hirings are not synonymous. An indefinite hiring excludes a general hiring; *The King v. Christ's Parish, York* (a). The words used by the master here, as well as there, must mean whatever time he chose.

*Whately*, contra. The distinction between general and indefinite hirings is not very intelligible. *The King*

(a) 5 D. & R. 314; 3 B. & C. 459.



v. *Great Bowden* (a) shews that such a hiring as the present is general, unless that intention be controlled by particular words. There is nothing here to shew that the pauper might have been turned away. [*Parke, J.* Is not this a question of fact, and were there not premises from which the sessions might draw the conclusion at which they have arrived? *Bayley, J.* The question is, whether the sessions might not infer that the hiring was not general?] It is submitted that the premises did not warrant the conclusion. [*Bayley, J.* In *The King v. Trowbridge* (b), the words were "to bide as long as he pleased." Here the master could have dismissed him when he pleased.] *The King v. Wincanton* (c), seems in point, which was followed up by *The King v. Stockbridge* (d), *The King v. Worfield* (e), and *The King v. Great Bowden* (f).

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BAYLEY, J.—If, according to what passes at the time of the hiring, the master may turn away the servant, or the servant may leave the master at any time, no settlement is gained. This is perfectly consistent with the case which we have decided this morning (g). The question is, not what inference any one of us should have drawn, but whether the justices were at liberty to infer that the servant might leave at any time. If he could have done so, no settlement was gained.

LITLEDALE, J., and PARKE, J., concurred.

#### Order of Sessions confirmed.

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|---|---|
| (a) <i>Ante</i> , i. 13; 7 B. & C. 249.   | (e) 5 T. R. 506.                                      |
| (b) Cited by <i>Bayley, J.</i> , in <i>Rex v. Christ's Parish, York</i> , 5 D. & R. 317; 3 B. & C. 462. | (f) <i>Ante</i> , i. 13; 7 B. & C. 249.               |
| (c) <i>Burr. S. C.</i> 295.   | (g) <i>Rex v. St. Andrew's, Cambridge, ante</i> , 19. |
| (d) <i>Ibid.</i> 758.   |   |

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## The KING v. The Inhabitants of CROYLAND.

An act for draining fen-lands vests 5000 acres in trustees, as a recompense for the undertakers, and directs that inhabitants upon any part of the 5000 acres, unable to maintain themselves, shall be maintained by the trustees, and not by the parishes. The 5000 acres become an incorporated district, but are not rendered extra-parochial; and hiring and service thereon confers a settlement, where the service is performed either in the particular parish or in the district generally.

AN order of removal of *Ruth Reed* and children from Spalding to Croyland, both in Lincolnshire, was confirmed by the Court of Quarter Sessions, subject to the opinion of the Court of King's Bench on the following case:—

The defendants proved a settlement in Croyland. In answer to which, the appellants proved a hiring and service for a year of the plaintiff's husband, in a certain part of Deeping Fen, mentioned in the 37th section of an act, 16 & 17 Car. 2, for the draining of that and other fens in Lincolnshire, and therein described as containing 5000 acres, set apart for an additional recompense to certain trustees therein mentioned. At the present time there are no overseers for Deeping Fen, but overseers were appointed for that place at intervals, but not *regularly*, from 1790 to 1810, since which last time no overseers have been appointed; and until the last eight or nine years a workhouse was kept and maintained in the said Deeping Fen for the residence and management of the paupers residing in the said fen. The said act of 16 & 17 Car. 2, was to be considered as part of the case. No part of the act appeared material, or was alluded to, except the first section, which mentioned *towns* as existing in the said fen, and the following section, 37, of the act above alluded to: "And be it enacted, by the authority aforesaid, that the said trustees, their heirs and assigns, or the survivor of them, or any of their tenants, farmers or groundholders, of any part of the said third part, or of the said fen, or of the said 5000 acres, shall not have, at any time hereafter, use, or claim any common of pasture, or other commonage of pasturing, in any part of the remainder of the said fens, nor any of them, nor in the north Fen of Pinchbeck and

Spalding, nor any part thereof, by virtue or pretence of his or her residence there. But all and every the inhabitants that may hereafter be upon any part of the said third part, or upon any part of the *said* 5000 acres, and are not able to maintain themselves, shall be maintained and kept by the said trustees, their heirs and assigns, and the survivor of them, and never become chargeable in any kind to all or any the respective *parishes* wherein such inhabitant or inhabitants shall reside or dwell, any statute to the contrary, &c."

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*Macdowal*, in support of order of Quarter Sessions. There are no churchwardens or overseers now existing in Deeping Fen, though overseers have been appointed at intervals, that is, persons called overseers in the special case. But in reality this Deeping Fen is extra-parochial, and, therefore, the justices could not remove the pauper, nor could he gain any settlement there. [*Littledale, J.* It is not stated whether it is extra-parochial, or a parish, or what]. Even if it is not extra-parochial, still by the above section, 37, the parishes are not to be charged, but the trustees, and the justices of the peace cannot direct an order to them, their order must be to the churchwardens or overseers.

*Bolland and Burnaby*, contra. It is immaterial in this case whether Deeping Fen be extra-parochial or not, for *quâcunque viâ datâ*, the pauper should have been removed thither, and not to Croyland, for that was not his last legal settlement, inasmuch as the hiring and service in Deeping Fen supersedes the settlement in Croyland. It does not appear by the case that this place is extra-parochial, and in truth it is not, but within the parish of Deeping; all that appears to the Court as to this point is from the act of parliament, and in s. 37 the word *parishes* is intro-

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duced, from which it must be inferred that these 5000 acres were infra-parochial; and therefore the justices should have removed to the parish of Deeping; and the proper course would be, if there are no overseers, to apply to the justices to appoint them. If, however, it be extra-parochial, still the parish of Croyland is not bound to maintain the pauper, but the trustees of Deeping Fen under the 37th sect. of the act, and Spalding should either have applied to magistrates to obtain an order of maintenance of children, or otherwise they should have obtained an order of removal and forced the trustees to have received the paupers. The only case at all in point is *Rex v. Saughton on the Hill* (a), and that is applicable to the first point, and *Rex v. Tamworth* (b) is an authority as to the second. The settlement in Croyland is equally superseded whether a settlement was gained in Deeping Fen, or the trustees were bound to maintain the pauper under the act. Besides he was not strictly chargeable to Spalding, for the 37th section expressly provides that he shall not be chargeable, and the parish of Spalding were not bound to relieve him; as in the case of men residing under certificates.

BAYLEY, J.—It seems to me in this case that the removal to Croyland cannot be supported, and that the order of sessions must be quashed. The removal to Croyland must be upon the principle that the parish of Croyland were bound to maintain the pauper. Now the pauper's husband had done that in Deeping Fen which, if done in any other place, would have given him a settlement in such place. There is nothing in the case or in the act of parliament to shew that Deeping Fen is extra-parochial, and the contrary is to be presumed, namely, that it is situated within a parish, and in that view clearly the pauper ought to have been removed

(a) 2 B. &amp; A. 162.

(b) Cald. 28.

thither. But the repellants rely upon a clause in the act of parliament. Now what is the fair construction of that clause? It is this: if the pauper is dwelling there, or if he does any act therein whereby he could gain a settlement, he is to be maintained by the trustees; not that he shall not belong to that parish; to enforce this, an application may be made by the parish wherein the place is situated, or probably it might be enforced by application of the parish wherein he may be resident. The true construction of the act is, not that the settlement is superseded, but that the trustees and not the parish are to bear the expense of the maintenance; therefore the order of sessions must be quashed.

LITLEDAL, J.—I am of the same opinion. We must take these fens to be in some parish, for by the first part of the act there is mention made of *towns* in them before the inclosure, which shews that they were not then uninhabited; besides, in the 37th section, mention is made of inhabitants residing in *parishes*. Now if the pauper's husband gained a settlement in the parish of Deeping, the settlement in Croyland is superseded. A different question would arise if it could be clearly proved that Deeping Fen is extra-parochial and no vill, for then no settlement could be gained, nor could the pauper be removed thither; and it may be a question whether the trustees under the 37th section of the act could be called upon to maintain him unless he were resident there. I think they could not; however it is not necessary to decide that point.

PABKE, J.—The pauper had a legal right to be maintained either by the parish in which the fen is situate, or by the trustees under the act. It is unnecessary to decide by which; for in either case the removal ought not to have been made to Croyland.

Order of Sessions quashed.

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## The KING v. The Inhabitants of RAWDEN.

Parolevidence as to the party to whom a demise is made, is not admissible where the agreement for the demise was in writing.

BY an order of two justices, *George Clayforth* and *Sarah* his wife, and *Hannah* and *James* their children, were removed from the township of Idle, in the West Riding of Yorkshire, to the township of Rawden in the same Riding. Upon appeal, the sessions confirmed the order, subject to the opinion of this Court on the following case:—

The respondents proved a settlement in the appellant township. The appellants then set up a subsequent settlement gained in the respondent township, by the pauper's having been rated, and having actually paid the rates in respect of a tenement of the annual value of 10*l.* 10*s.* in that township. It appeared that in December, 1823, the pauper began to occupy the tenement, which was the property of *Joshua Compton Esq.*, that he occupied it for a twelve month, and paid the rent for it and also the rates, during all which time he resided in that township. In answer to this, the respondents insisted that the pauper did not take the tenement of *Mr. Compton solely*, but *jointly* with his father and father-in-law; and to prove this, they called *Mr. Robinson*, who was *Mr. Compton's* steward at that time. He stated that he did not know who occupied the tenement in question. He was then asked by the counsel for the respondents, who it was to whom he had let the tenement, and who were the tenants. Whereupon the appellants' counsel interposed, and asked him whether there was not an agreement in writing, and on his admitting that there was, they objected that parole evidence of the letting and tenancy could not be received. The Court, however, permitted the question to be put, and the witness stated that he had let the tenement to the pauper, the pauper's father and father-in-law; that they were the

tenants, and that they jointly delivered a notice to quit, but that he could not say whether this notice was signed with one or more names. Upon this evidence, the Court of Quarter Sessions confirmed the order. If the Court of King's Bench shall be of opinion this evidence was improperly received, then the order of sessions is to be set aside.

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*Blackburn and Dundas*, in support of the Order of Sessions. *The King v. The Inhabitants of the Holy Trinity and St. Margaret's, Hull* (a) is directly in point. There it was decided that parol evidence of the fact of tenancy is admissible, although it appear that the tenant holds under a written contract. Here the witness was called to rebut the presumption raised by the payment of rates, that the pauper paid them in respect of a tenement of 10*l.* a year. This case is directly within the reason of the judgment in *Rex v. Hull*, as reported in 1 M. & R. The same principle is to be found in *Butcher v. Jarratt* (b).

*Starkie and Milner*, contra, were stopped by the Court.

BAYLEY, J.—The difficulty consists in admitting parol evidence, there being a written agreement. This is a case where *primâ facie* it cannot be asked to whom the property was let. This distinguishes the present case from *Rex v. Hull*.

LITTLEDALE, J., concurred.

PARKE, J.—The respondents wished to prove, not who occupied the tenement, but to whom it was let. This could not be done without the agreement. It was not competent to them to shew to whom the land was let, except by the instrument letting it.

Order of Sessions quashed (c).

(a) 7 B. & C. 611; 1 M. & R.  
 444.

(b) 3 B. & P. 143.

(c) *Vide* 1 M. & R. 446, (c),

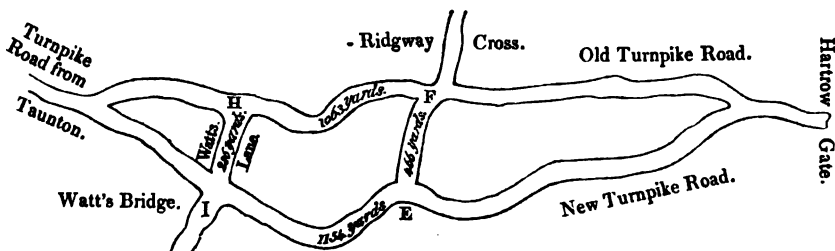
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where it seems to have been considered that proof of the fact of tenancy stood upon the same footing as proof of the terms of the holding. By 3 & 4 W. & M. c. 11, s. 6, any person coming to inhabit in any parish, charged with and paying his share towards the public taxes of the said parish, shall gain a settlement.

Here the pauper occupied the tenement in question for twelve months, paid the rent, and also the rates for it. Query, whether, even supposing that demise to be joint, a settlement was not acquired in Idle. *Vide Rex v. St. Dunstan's*, 7 D. & R. 178; 4 B. & C. 686.

The KING v. WINTER.

THE following order was made by two justices of the peace:—



An order for diverting and stopping up a highway, and substituting for it a new road is bad, unless it appear that the public acquire as permanent a right in the latter as they had in the former.

Somerset, to wit. We, *Francis Popham, Esq.*, and *Joseph Guerin*, clerk, two of his Majesty's Justices of the peace for the said county, at a special sessions for the highways held at the Lethbridge Arms Inn, in the parish of Bishop's Lydeard, in the hundred of Kingsbury West, in the said county, on the 11th day of December, 1827, having upon view found that a certain part of a highway, within the said parish of Bishop's Lydeard, in the said hundred and county, called Watt's Lane,

*Semble*, that this must appear on the face of the order.

*Semble*, that the order should shew a contract with the owner of the land over which the new road is to be made.

*Semble*, that upon the diversion of a highway, it cannot be continued for foot-passengers only.



otherwise called Sandy Lane, lying between the road described in the plan hereunto annexed, as the new line of turnpike road from Taunton to Hartrow-Gate, in the parish of Stogumber, in the said county, at or near a certain bridge called Watt's Bridge, marked in the said plan with the letter I, and the public highway heretofore part of the turnpike road from Taunton to Hartrow-Gate aforesaid, at or near a certain dwelling house in the occupation of *James Markes*, marked on the said plan with the letter H, for the length of two hundred and eighty six yards or thereabouts, and particularly described in the said plan hereunto annexed, may be diverted and turned so as to make the same more commodious to the public; and having viewed a course proposed for the new highway, in lieu thereof, through the lands and grounds of Sir *Thomas Buckler Lethbridge*, of Sandhill Park, in the said county, Baronet, lying between the said new line of turnpike road from Taunton to Hartrow-Gate aforesaid, at or near a certain turning in the said last mentioned turnpike road, in the parish of Ash Priors in the said county, marked on the said plan with the letter E, and the said public highway, heretofore part of the turnpike road from Taunton to Hartrow-Gate aforesaid, at or near a place called the Cross at Ridgway, otherwise called Ash Cross, in the said parish of Bishop's Lydeard, in the said county, marked on the said plan with the letter F, of the length of 462 yards or thereabouts, and of the breadth of sixteen feet or thereabouts, particularly described in the said plan hereunto annexed; and having received evidence of the consent of the said Sir *T. B. Lethbridge* to the said new highway being made through his lands and grounds hereinbefore described, by writing under his hand and seal, in consideration of the said part of the said old highway, hereby ordered to be diverted and turned, being sold, exchanged and to be

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vested in him (saving always and reserving nevertheless a free passage for all persons on foot through the land and soil of the said part of the said old highway, hereby ordered to be diverted and turned, according to the ancient usage in that respect); we do hereby order that the said last mentioned highway be diverted and turned through the lands aforesaid; and when such new highway shall be properly made and completed, and put in good condition and repair, and fit for the reception of travellers, and so certified by two of his Majesty's justices of the peace in and for the said county of Somerset, upon view thereof, and after such certificate shall have been returned to the clerk of the peace of the said county, and by him enrolled amongst the records of the court of quarter sessions, at the general quarter sessions of the peace to be holden in and for the said county, next after the general quarter sessions of the peace in and for the said county, at which this our order shall have been confirmed or enrolled, pursuant to the directions of the statute in that case made and provided; we do hereby order the said part of the said old highway, hereby ordered to be diverted and turned, being of the length of two hundred and eighty six yards or thereabouts, and of the breadth of twelve feet or thereabouts, upon a medium, as appears by the said plan, to be stopped up, subject to and saving always and reserving nevertheless a free passage for all persons on foot through the land and soil of the said part of the said old highway so ordered to be turned and stopped up, according to the ancient usage in that respect. And whereas the said Sir *T. B. Lethbridge* hath consented as aforesaid to the making and continuing of the said new highway through his lands; in consideration that the said part of the said old highway, hereby ordered to be diverted and turned and stopped up, be sold and exchanged and vested in

him; saving always and reserving nevertheless as aforesaid; we do hereby order that the said lands, ground, and soil of the said Sir *T. B. Lethbridge*, for the said new highway hereby ordered to be made as aforesaid, be purchased by the sale, disposal, and exchange of the said part of the said old highway, hereby ordered to be diverted and turned and stopped up, and the same to be vested in the said Sir *T. B. Lethbridge*, subject and saving always and reserving nevertheless as aforesaid; and we do hereby approve and direct that the surveyors of the highways of the said parish of Bishop's Lydeard do and shall make an agreement with the said Sir *T. B. Lethbridge*, being the person seised, possessed of, and interested in the said lands, ground, and soil through which the said highway, hereby ordered to be diverted and turned, is hereby ordered to and will go, for the recompense to be made for such ground and for the making of such new ditches and fences as shall be necessary by the sale, disposal, and exchange to and with the said Sir *T. B. Lethbridge* of the said part of the said old highway hereby ordered to be diverted and turned and stopped up, and the same being vested in the said Sir *T. B. Lethbridge*, subject and saving always, and reserving nevertheless, as aforesaid. Given, &c.

On appeal, the Court of Quarter Sessions confirmed the order, subject to the opinion of this Court whether the order could be legally made under the statute 55 Geo. 3, c. 68, inasmuch as the intended new road from E. to F. did not either commence or terminate at the same points as the road to be stopped up, the distance between I. and E. being 1154 yards, and between H. and F. 1063 yards. And also, inasmuch as the highway from F. to H. was one of the roads included in the act of 3 Geo. 4, c. 65. for repealing several acts passed for re-

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pairing roads leading to the town of Bridgewater, in the county of Somerset, and other roads therein mentioned, so far as the said act related to the roads leading to the said town, and for consolidating and comprising the same in one act.

*Brougham, C. F. Williams, Cabbell, and F. N. Rogers,* (with whom was *Sir J. Scarlett*), in support of the order. It is objected that the new road is more circuitous than the old, and that the termini of the two roads are not the same (a). The comparative nearness of the new line of road was matter entirely for the consideration of the magistrates. When a highway is diverted, the way directed by the order to be used may consist of road partly old and partly new. *De Ponthieu v. Pennyfather* (b). [*Bayley, J.* That was not a case in this Court as to the validity of an order. No bargain is stated. *Sir Thomas Lethbridge* is to have the land upon terms which may be agreed on.] He is bound. [*Bayley, J.* No. If the land which *Sir Thomas Lethbridge* acquires by the exchange be of more value than that which he gives up, *interest parochiæ* that the price be ascertained.] Lord Coke says, (c) "If *A. pro consilio impenso*, &c., make a feoffment or a lease for life of an acre, or (if he make such feoffment or lease) *pro unâ acrå terræ*, &c., albeit he denieth him counsel, or that the acre be evicted, yet *A.* shall not re-enter; for in this case there ought to be legal word of condition or qualification, for the cause or consideration shall not avoid the state of the feoffee." So here, the dedication to the public of the new road will not be defeated upon the expiration of the turnpike act, which was the cause or the occasion of the dedication.

(a) No judgment was given upon either of these points. (b) 5 Taunt. 634; 1 Marsh. 261. (c) Co. Litt. 203 a.

The third question raised, is upon the construction of the Bridgewater act. [*Bayley, J.* You may speak to that afterwards if it shall become necessary. Suppose the act, under which the turnpike road was diverted, to say that the new road shall be a public road for twenty-one years, what authority or reason is there for saying, that the new road shall be a highway afterwards?] By 3 *Geo. 4*, c. 126, s. 88, when any turnpike road shall be diverted and turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be deemed and taken to be a common highway : and by sect. 4 all the provisions in that act are extended to private acts. [*Bayley, J.* If by the turnpike act, the road became a highway reparable by the parish, it would remain a highway whilst the act continued, and the proprietors of the soil would be at liberty to take the land for their own purposes, and to obstruct the public. Here the justices have obstructed. But the public are entitled to have a perpetual road from I. to H. No consent appears on the face of the case permitting the public to pass from I. to E. That right, therefore, must depend upon the act. *Littledale, J.* The case appears to be imperfectly stated. Formerly there was a road from I. through by H. to F. If the new turnpike road from I. to E. was made by virtue of an order of the commissioners, it would become a common highway under the express provision of 3 *Geo. 4*, c. 126, s. 98. If you had an order, it appears to me that the road from I. to E. would be well substituted for the road from H. to F. *Parke, J.* The difficulty is stated in the special case.] It appears upon the face of the special case, and also upon the plan. The act of 3 *Geo. 4*, c. 126, embodies all the former acts. If, therefore, it appears that the road from I. to E. is a new road, it must have been made under the provisions of that act.

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*Tindal, S. G., Alderson, Jeremy and Erle, contra,*  
 were stopped by the Court.

BAYLEY, J.—It is not necessary to give any opinion upon the question, whether the magistrates can vary the line for carriages and retain the old line as a public road for foot passengers. A power is given to reserve a private road, but it does not appear that the magistrates are expressly authorised to reserve a public road for any purpose whatever. It might be objected that the parish would be thereby rendered liable to the repair of two roads instead of one. As to the other point, when the justices are taking away a public right, we ought to be satisfied that something equally permanent is substituted. But if the new turnpike road was made under the local act, it could be made only for twenty-one years. If, on the other hand it be said, that it was made by an order under the 3 Geo. 4, c. 126, such order should have been stated in the case.

LITTLEDALE, J.—If the road from I. to E. became a turnpike road without having been previously a highway, it would be a highway merely during the continuance of the turnpike act under which it was made, and the public would not derive from the order a benefit equal to that which was taken away. On the face of the order this is left uncertain. The order having left this point doubtful, if when the case came before the Court of Quarter Sessions it had been found as a fact in what manner the line from I. to E. became a public highway, we might have seen whether the division could be legally made a road; but here we are left quite in the dark. Upon the other point we cannot give any judgment as to the validity of the order. There appears to be considerable difficulty in reserving a *public* way for

any purpose, when a highway is diverted. I never heard of such a reservation. But upon this point I give no opinion. As to the consent, I rather think that it was sufficient. It was part of the agreement, and the price of the agreement. The words "shall and may be sold," in the statute (*a*) appear to me to apply to cases where a sale is necessary.

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PARKE, J.—It is enough to say that this is a case in which the order does not shew any jurisdiction properly exercised. The Court will give the magistrates credit for the proper exercise of the discretion vested in them; but we are bound to see that on the face of the order, the public have as good and permanent a right to go from I. to E. as they had from H. to F. Here it is quite uncertain under what authority the road from I. to E. became a highway. It is for the person who would avail himself of the power of the magistrates to shew that it was properly exercised.

#### Order of Sessions quashed (*b*).

- (*a*) 3 *Geo. 4*, c. 126, s. 86. was argued in Trinity Term,  
 (*b*) The following special case 1830:—

#### ALLNUTT and another v. POTT.

THE case stated, that until 12 March, 1829, the close mentioned in the declaration, in which the trespasses were committed, was a common highway and turnpike road for all the king's subjects, leading from Penshurst to Cowden; on the 12 March, 1829, the following order was made by the trustees, acting under the authority of an act of the 9th year of the reign of King *George 4*, entitled, "An Act for making and

repairing the Road leading from Penshurst to Cowden." "The undersigned trustees hereby order that so much of the old turnpike road leading from Penshurst town to Cowden, as lies between the points at which the said old turnpike road touches the new line of turnpike road lately formed at or near the foot of Blower's Hill, commencing above Machin's Cottage, and extending to the road or way leading out of the said

An order for stopping up a road under the general turnpike act, 3 *Geo. 4*, c. 126, where the site of the old road is taken in exchange for that of the new, is valid, although no conveyance to the trustees be executed.

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turnpike road towards farms, respectively called Harden's and Salmon's, and containing in length by admeasurement 66 rods and one half, be the same more or less, and situate in the parish of Penshurst aforesaid, shall be stopped up and wholly discontinued to be used as a public highway, the same having in the judgment of the said trustees become useless and unnecessary, and that the said old turnpike road so ordered to be stopped up shall be given up to and become the sole and absolute property of *Frances Allnutt*, of South Park, in Penshurst aforesaid, widow, and *Charles Pott*, of Bridge Street, Southwark, esquire, as devisees in trust under the will of the late *Richard Allnutt*, of South Park aforesaid, esquire, deceased, pursuant to the agreement in that behalf with the said devisees, and in exchange for the land given up by them and intended to be forthwith conveyed to the said trustees, and now formed into and constituting the new road as aforesaid, and to be henceforth used as and for a turnpike road, containing in length by admeasurement 66 rods or thereabouts, and also situate in Penshurst aforesaid, together with the piece of land also given up by the said devisees to the said trustees, and added to the said turnpike road, containing in length 22 rods, and in width (on an average) one half rod or thereabouts, lying higher up on Blower's Hill aforesaid, on the left hand side ascending the hill, and in the said parish of

Penshurst." This order was signed by five trustees, one of whom was the chairman duly appointed for that purpose. No previous order had been made by the trustees, nor was there any agreement in writing by the plaintiff to convey to the trustees the soil of the new line of road mentioned in the order, but the said new line of road had been completed at the expense of the plaintiff before the 12th of March, 1829, and the soil thereof was duly conveyed by the plaintiffs to the trustees on the 22d October, 1829, and on that day the trustees of the road conveyed to the plaintiffs the soil of the said old road. Trespasses were committed by the defendant in the said old road between the 12th March and the 22d of October, 1829, and also between the latter period and the commencement of the action.

*Brodrick*, for the plaintiff. The defendant will rely upon *The King v. Winter*, (*suprà*, 46,) but that case was determined upon the 55 *Geo.* 3, c. 68, s. 2, and 3 *Geo.* 4, c. 65. But this case turns upon the construction of 3 *Geo.* 4, c. 126. If the plaintiff can shew that the public have acquired a new turnpike road, the plea cannot be supported. The provision of 3 *Geo.* 4, c. 126, applies to all local acts which were then in force, or which should be afterwards enacted. No form of order is given by any schedule annexed to this act, nor does it appear necessary



that any order at all should be made where land is taken in lieu of land. The first sect. of 3 Geo. 4, c. 126, which has any bearing upon this point is the 83d. which authorises trustees of turnpike roads to make, divert, shorten, vary, alter and improve the course or path of any road under their care and management, tendering and making satisfaction to the owners. Section 84 authorises the trustees to treat, contract, and agree with the owners of and persons interested in any lands and tenements which they shall deem necessary to purchase for the purpose of widening, &c., such road, for the purchase thereof and for the loss or damage such owners or persons may otherwise sustain. And it shall be lawful for all bodies politic, corporate or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, committees, executors, administrators, and all other persons whatsoever, not only for or on behalf of themselves, their heirs and successors, but also for and on behalf of the person or persons entitled in reversion, remainder, or expectancy after them; and for and on behalf of their *cetteux que trust*, whether feme covert, infants, &c., and to and for all and every person and persons whatsoever possessed of or interested in any such lands and tenements, or who shall sustain any damage as aforesaid, to contract with the said trustees for the sale thereof, or for the

satisfaction to be made, and by conveyance, lease and release, or bargain and sale, to sell and convey unto the said trustees all or any such lands or tenements for the purposes aforesaid. And all contracts, sales, and conveyances so made shall be good, valid and effectual to all intents and purposes without fine or recovery, and shall be a complete bar to all estates tail and other estates, rights, titles, trusts and interests whatsoever. Section 85, provides for the ascertainment of the value by a jury where the parties neglect or refuse to treat or do not agree, or are prevented from treating by reason of absence, and directs that the verdict on inquisition and judgment, order and determination thereon shall be final, binding, and conclusive against all parties and persons claiming any estate in possession, reversion or otherwise, their heirs and successors, as well absent as present, infants, &c., bodies politic, &c., as well as all and every person or persons whatsoever. Section 86, after directing the application of the money assessed, or agreed to be paid, contains the following provision, "and upon such payment to such parties or persons, or their agents, or into the Bank of England, and after 30 days' notice thereof given, &c., then such lands, &c., shall be vested in such trustees, &c., and shall and may be taken and used for the purpose of such act, and such lands, and the site of such lands, &c., shall be laid into

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and made part of the road in such manner as the said trustees or commissioners shall direct, and shall be repaired and kept in repair by such trustees or commissioners by the same ways and means as any other part of the road under their management is or ought to be kept in repair; and all parties and persons whomsoever shall be divested of all right and title to such lands, &c.; and after such new road shall be completed, the lands and grounds constituting any former roads or road, or so much and such part or parts thereof as in the judgment of the said trustees or commissioners may thereby become useless or unnecessary, shall and may be stopped up and discontinued as public highways (unless leading over some moor, heath, common, uncultivated land or waste ground, or to some church, mill, village, town or place, lands or tenements to which such said new road or roads doth not or do not immediately lead, and which may therefore be deemed proper to be kept open either as a public or private way or ways for the use of any inhabitant at large, or any individual or individuals) and shall be vested in, and shall and may be sold and conveyed by the said trustees or commissioners in the manner herein mentioned, for the best price that can be gotten for the same, and the money arising by such sale shall be applied for the purposes of the act for repairing and maintaining such turnpike road, and all conveyances being executed by the said

trustees or commissioners and enrolled in the office of the clerk of the peace for the county, city or place wherein such road shall be situate shall be good and effectual in the law to all intents and purposes whatsoever; or it shall be lawful for the said trustees or commissioners instead of making such sale as aforesaid, to give up to the owners or proprietors of any adjoining lands, tenements or hereditaments, whose building, land or ground shall be had or taken for the purposes of this act, any part or parts of the present or old roads, in lieu of and in exchange for the same, in such way and manner as such trustees or commissioners and owners or proprietors shall agree upon and think fit. Upon the face of this order it appears, that the new road was to be given in compensation for the old road. This order comes within the last clause of the 86th section. The provisions of section 88 are most important. "That when any turnpike road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and shall be subject to all the provisions and regulations in any act of parliament contained or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or per-

sons whose lands adjoin thereto, as herein after mentioned with regard to pieces of ground not wanted; but if such old road shall lead to any lands, house or place, which cannot in the opinion of the said trustees or commissioners be conveniently accommodated with a passage from such new road, which they are hereby authorised to order and lay out if they find it necessary, then and in such case the old road shall be sold, but subject to the right of way and passage to such lands, house or place respectively, according to the ancient usage in that respect; and the money arising from such sale in either of the said cases shall be applied towards the purchase of the land where such new road shall be made, or in the same manner as the tolls arising on such road, as the trustees or commissioners thereof shall think fit. And upon the completion of any contract whereby any part of the old road shall be given in payment for the value of the ground taken for the new road, or upon payment of the price of any part of the old road, the soil of such old road shall become vested in the purchaser thereof and his heirs, but all mines, minerals and fossils lying under the same, shall continue the property of the person or persons who would from time to time have been entitled to the same if such old road had continued." As soon, therefore, as the new road was made and completed in lieu of the old road, and the public had acquired

the same rights upon the new road as they had enjoyed upon the old, the property in the old road vested in the plaintiffs. Not a syllable is to be found in this statute requiring a conveyance to the trustees in such a case, though for greater security a conveyance was in fact afterwards executed, and the trespasses were committed even after that conveyance. The form of the order used on this occasion seems to have been taken from *De Beauvoir v. Welch*(a), in which no objection was taken to the form of the order. Here the order substantially complies with all that the statute requires. The conveyance may be coupled with the order, so as to give a title to the new road. [*Bayley, J.* Is there any clause of appeal?] An appeal is given to the next quarter sessions by the 4th of *Geo. 4*, c. 95, s. 87. [*Lord Tenterden, C. J.* Parties are not bound to appeal against an order which is bad on the face of it.]

*Barnewall*, contra. If the order was not originally good, the defendant would be justified in using the old road. This order was bad on the face of it. The authority of the trustees depended upon a condition which has not been performed. It is not denied on the other side that the public must have some road. It is said that the 88th section vests the soil in the trustees, but that is only so where the road is properly diverted. The new road must be completed so as to give the public a beneficial use of it.

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(a) *Ante*, i. 7; 7 B. & C. 266; 1 M. & R. 81.

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The 84th section, after enumerating persons who, without a special enactment, would be incapable, authorises them to sell and convey, that is, to convey where there is an agreement. Where persons refuse to treat, the ascertainment is to be before a jury, which is made equivalent to a conveyance. The second case is, where the parties do not chuse to come in, or refuse their purchase money, after the new road is completed, and refers to the road which is previously to be conveyed to trustees, either by actual conveyance or by the verdict of a jury. Upon the face of the order the trustees do not shew how the road is become unnecessary, yet the power to stop up is only given in certain cases. It ought to appear on the face of the order that the old road has become unnecessary. It does not appear that the road was diverted or turned. That section does not, therefore, apply to this case. The trustees possess a power of stopping up only where the same right is given to the public. It was not the intention of the legislature by that clause alone to transfer the property without an actual conveyance. [*Bayley, J.* May not the public have a right of passage without the soil being conveyed?] It does not appear upon the face of the order that the new road had ever been used. It was perfectly competent to the owner of the soil of the new road to revoke the authority and exclude the public. A dedication to the public is

not to be presumed. The owner would not be bound, inasmuch as there was no agreement in writing to comply with the statute of frauds.

*Brodrick*, in reply. The clause requiring a conveyance does not apply. The case is where the party has a complete title. It would be totally useless in such cases to execute a conveyance. The clause must be governed by the other parts of the statute. It is admitted that no conveyance is necessary where the value is assessed by a jury. The mere conveyance of the soil to the trustees would not give the right of passage.

Lord TENTERDEN, C. J.—The question is whether a new road can be effectually dedicated to the public by a person who is *sui juris*, without an actual conveyance. It is perfectly clear, that if such a party agree with the trustees, and the money is paid, no conveyance is necessary. When parties neglect or refuse to treat, there need be no conveyance. A conveyance is required where parties are under some legal incapacity. And it is reasonable that in such a case a conveyance should be executed, in order that there may be evidence against the *cestui que trust*. When a person *sui juris* sells, I cannot see why this should be necessary, when he manifests his consent by permitting the road to be made over his land.

The other judges concurred.  
Postea to the plaintiff.

**CASES**  
IN THE  
**COURT OF KING'S BENCH,**  
FOR THE USE OF  
**Justices of the Peace.**

**HILARY TERM, 1829.**

**EX PARTE SYLVESTER.**

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**THIS** was a rule nisi for a certiorari to remove into this Court, for the purpose of its being quashed, a conviction, under the 5 *Ann.* c. 14, for keeping and using a gun to kill and destroy game without a qualification. The conviction stated in substance, that on the 2d September an information was laid before a magistrate against *Sylvester* for keeping and using a gun to kill and destroy game, he not being a qualified person; that *Sylvester*, having been duly summoned, personally appeared and pleaded not guilty; that thereupon one *A. B.*, a credible witness in that behalf, being duly sworn, deposed, that on the 2d September *Sylvester*, not having lands, &c., nor being otherwise qualified, did keep and use a certain gun to kill and destroy the game, the same gun then and there being an engine for the killing and destroying such game, contrary to the form of the statute, &c.; that the said *A. B.* saw *Sylvester* on the said 2d September shoot a

An unqualified servant going out with his qualified master, and shooting game in his presence and for his use, is liable to a penalty under 5 *Ann.* c. 14, for keeping and using a gun to kill game.

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partridge with the said gun, and that one *C. D.* was with *Sylvester*, but did not shoot; that thereupon *Sylvester* said he was not guilty of the said offence, and in order to prove the same, the said *C. D.* came and deposed, that on the said 2d September he was seised of an estate of inheritance in possession in his own right, of the clear yearly value of 100*l.* and upwards; that *Sylvester* was on the said 2d September employed by him as his servant to accompany him into the field sporting; that *Sylvester* on that occasion shot with a gun of his, *C. D.*, in his presence and by his order and for his use, at game, and that he, *C. D.*, did not shoot at game, or use a gun for that purpose on that day; that he had taken out a certificate to kill game, and was qualified in his own right to do so; and that *Sylvester* shot at the partridge before mentioned as his servant, and for his use. Whereupon, &c.; adjudication of conviction of *Sylvester*.

*Campbell* shewed cause. The conviction was right, and this rule must be discharged. It is not pretended that *Sylvester* himself was qualified, or that he was a gamekeeper appointed by virtue of the power given to the lord of a manor by the fourth section of the 5 *Ann.* c. 14. The only answer given to the information was, that *Sylvester* was sporting in the presence of his master, who was a qualified person, and by his order and for his use. But that is no justification of the servant, because the use of the gun by him cannot be considered as the act of the master, in which view alone, according to all the cases, would the presence of the master protect the servant.

*Talfourd*, contra. The use of the gun by the servant in this case may be fairly considered as the act of the master, and if so, it is admitted that *Sylvester* was im-

properly convicted. There are several cases upon the point undistinguishable in principle from the present. In *Rex v. Taylor* (a) it was held, that a groom attending his qualified master while using dogs for killing game, and pursuing it by his master's command, was not liable to any penalty. In *Lewis v. Taylor* (b) it was held, that an unqualified person going out with the qualified owner of greyhounds to course a hare, was not liable to any penalty, though he took an active part in the sport by beating the bushes to find a hare, and took it up after it was killed. In *Walker v. Mills* (c), the servant of a qualified person assisted his master in setting a trap on his land for taking rabbits and vermin, and his master ordered him, if a hare should be caught, to bring it to him; a hare was caught in the absence of the master, and was killed and carried to him by the servant; it was held, that the servant was not liable to a penalty for using a snare to destroy game. The only difference between the last-mentioned case and the present is, that here the servant used a gun instead of a trap; but both are engines for the destruction of game within the statute 5 Ann. c. 14; therefore, that case is a direct authority against the present conviction.

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BAYLEY, J. (d).—The present case appears to me to differ in principle from all those which have been cited. The principle upon which the two former proceeded was, that the using the dogs was the act of the master and owner, and not of those who accompanied him. So

(a) 15 East, 460.

(b) 16 East, 40.

(c) 4 J. B. Moore, 343; 3 Brod. & Bingh. 1. And see *Molton v. Rogers*, 4 Esp. 217; *Turner v. Coningsby*, Bull. N. P.

169; *Hawke v. Jackson*, 2 Selw. N. P. 7th ed. 886; *Clark v. Broughton*, 3 Camp. 328.

(d) Lord Tenterden, C.J. was absent.

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in the latter the principle of the decision was, that the trap being set by the order of the master and in his presence, must be considered as having been set by him. But I think it is impossible to say that of using the gun in the present case; neither the hand nor the skill of the master was employed: it was the hand and the skill of the servant only. If the firing of the gun by a servant could be held to be the act of the master, he might take out twenty servants with him in the same manner, and contend that the use of twenty guns by twenty persons at the same time was his own act. I think the gun must be considered as being used by the person who actually fired it, and in that view of the case it differs from the authorities that have been cited, and it follows that this party was properly convicted.

LITTLEDALE, J. concurred.

PARKE, J.—I am entirely of the same opinion. I would merely add, that the case of *Walker v. Mills* (a), which was most relied upon by Mr. *Talfourd*, differs from the present in another respect, namely, that there the trap was used with the intent to destroy vermin, and thereby prevent a nuisance, and not, as the gun was in the present case, for the purpose of killing game in the ordinary mode of sporting.

Rule discharged.

(a) 4 J. B. Moore, 343; 3 Brod. & Bingh. 1.





1849.

## The KING v. HALPIN.

**THIS** defendant had been convicted of publishing a libel, which imputed to the prosecutor that he had been guilty of perjury, and other indictable offences. Upon his being now brought up for judgment, he, by his counsel, tendered, in mitigation of punishment, affidavits alleging that the prosecutor had committed the offences imputed to him by the libel.

A defendant brought up for judgment after being convicted of publishing a libel imputing indictable offences to the prosecutor, cannot be allowed, in mitigation of punishment, to read affidavits alleging the truth of the libel.

*Campbell* and *Ludlow*, Serjt., objected that such affidavits could not be read. They quoted *Rex v. Burdett (a)*, and *Rex v. Finnerty* there cited, and relied upon those authorities as decisive on the point.

*Curwood* and *Busby*, *contra*. The present case differs from those cited. The affidavits tendered and rejected in those cases reflected upon the character and conduct of third persons not then before the Court; whereas, the affidavits now tendered affect the prosecutor only, who is before the Court, and in the character of prosecutor, which he has elected to adopt, and of the inconveniences attending which he has, therefore, no right to complain. These affidavits undoubtedly shew, not only that the defendant believed the contents of the libel to be true at the time when he published it, but also that parts of those contents actually are true; and such matter appears upon principle properly admissible in mitigation of punishment: because, to publish a libel of a guilty person, though in the wisdom of the law not strictly justifiable, is surely a much lighter offence than to publish it of an innocent person. In *Rex v. Burdett (b)*, upon the Attorney-General stating, that "in *Rex v. Finnerty* affidavits of the truth of the facts stated in

(a) 4 B. &amp; A. 314.

(b) 4 B. &amp; A. 321.

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the libel were refused in mitigation of punishment," *Best, J.*, is reported to have interposed, and observed, "in *Rex v. Draper* (a) the Court received such affidavits, but I believe it was with the consent of the prosecutor." His lordship afterwards, in the course of his judgment (b), observed, "The present case is very distinguishable from *Rex v. Draper*, to which I have called the attention of the Court. The libel of the defendant, there, consisted in a statement of facts within his own knowledge; but that which induced the defendant to publish this libel, was the statement of facts which he read in the newspapers." Now the reason there given for distinguishing *Rex v. Draper* from the case then before the Court, is of equal weight to assimilate it to the present case, and to render it an authority for the reception of the affidavits now tendered. Again, in the marginal note of *Rex v. Draper* (c), it is said, "*Semble*, although the truth of a publication is no justification, yet if the Court see that it is true, or probably may be true, it may be good cause why the Court should not interfere by granting a criminal information." Now the only mode by which the Court could be informed of the truth of the libel, would be by reading the defendant's affidavits to that effect; and if such affidavits are receivable to prevent inquiry into the guilt or innocence of a defendant, *à fortiori* they are receivable, after proof of his guilt, in mitigation of his sentence.

LORD TENTERDEN, C. J.—The affidavits now tendered charge the prosecutor with the commission of several offences, for each of which the defendant might and ought to have prosecuted him, if the charge is true. I cannot distinguish this case in principle from that of

(a) 3 Smith, 391.

(c) 3 Smith, 391.

(b) 4 B. & A. 328.

*Rex v. Finnerty*, and upon the authority of that case I am clearly of opinion that we ought not to receive these affidavits. The defendant is at liberty to read his own affidavit, stating, that at the time when he published the libel he believed its contents to be true, and setting out reasonable grounds for such belief. To go further, would be in effect to put the prosecutor upon his trial upon affidavit, which would be a most unjust proceeding.

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BAYLEY, J.—I am entirely of the same opinion. It seems to me impossible, upon any substantial principle of justice, to receive such affidavits as these. It would be trying the prosecutor upon affidavit, and placing him in a situation of peril and injustice, to which we have no right to expose him. It would be far better, of the two, to permit the defendant to give parol evidence of the same nature at his own trial<sup>(a)</sup>, for then the prosecutor would have the advantage of cross-examining the witnesses, which he cannot have here. The Court has, I believe, never yet gone further than receiving the defendant's affidavit of his belief of the truth of the libel when he published it, and I am perfectly satisfied that is the furthest we can go consistently with justice.

PARKE, J.—<sup>(b)</sup> I entirely concur with the rest of the Court upon this subject. No authority has been cited for the reception of such affidavits as are now tendered, for I cannot consider *Rex v. Draper* as a direct authority upon that point. There are authorities the other way, to which we are bound to adhere. I, for one, should require very strong authorities indeed to induce me to come to a different decision.

Affidavits rejected. <sup>(c)</sup>

<sup>(a)</sup> Vide *Rex v. Bradley*, *ante*, vol. i. 387; 2 M. & R. 152.

<sup>(b)</sup> *Littledale*, J., had gone to chambers before the case came on.  
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<sup>(c)</sup> In *Rex v. Roberts*, M. 8 Geo. 2, in B. R. on a motion for an information against the defendant for a libel, Lord Hard-  
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*wicke*, C. J. thus expressed himself. "It is said that if an action were brought, the fact, if true, might be justified, but I think that is a mistake. Such a thing was never thought of in the case of *Hurman v. Delaney*, E. 4 Geo. 2, (2 Stra. 898). I never heard such a justification for a libel even hinted at. The law is too careful in discountenancing such practices. All the favor that I know the truth affords in such a case is, that it may be shewn in mitigation of damages in an action, and of the fine upon any indictment or information."

Information for publishing a libel against Mr. Swinton of Wadham College, Oxford, ac-

cusing him of an infamous crime. *Lee*, C. J. rejected evidence offered of the defendant's reasons for the accusation, viz. the information of the supposed accomplice; saying, that the only question was, whether the defendant was guilty of publishing the libel; that it had always been holden that the truth of the libel could not be given in evidence by way of justification, because if the person charged with any crime is guilty, he ought to be proceeded against in a legal course, and not reflected upon in such a manner. Bull. N. P. 9; and see *Rex v. Bradley*, ante, vol. i. 387; 2 M. & R. 152.

DOE, on the demise of WARREN, v. AARON BRAY.

A baptism cannot be proved by a minute written at the time by the parish clerk, nor by an entry in the parish register made at a subsequent period by a succeeding incumbent, founded upon such minute.

**EJECTMENT** for lands in Castle Morton, in the county of Worcester. At the trial before *Vaughan*, B. at the Worcester Spring Assizes, 1828 (a), a *prima facie* title having been shewn on the part of the lessor of the plaintiff, the defendant set up a title derived from *John Bray*. To prove that he was the legitimate son of *John Bray*, the defendant produced the parish register of Castle Morton, for 1776, which, under the head of "Baptisms," contained the following entry: "6th February, Aaron, son of John and Elizabeth Bray." This entry was made in June, 1777, by a clergyman, who did not become rector of Castle Morton until the death of the prior incumbent in the early part of that year. In 1776, the

(a) Counsel for the plaintiff,  
*Campbell* and *R. V. Richards*;

for the defendant, *Taunton* and  
*Maule*.

latter being infirm, no regular entries of baptisms were made in the parish books, but a person who was the parish clerk during the incumbencies of both rectors, wrote memoranda of these occurrences on slips of paper, from one of which the second rector made the above entry. On the part of the plaintiff it was contended, that neither the minutes of the clerk, nor the entries in the register prepared from such minutes, were evidence. The learned Judge overruled the objection, the minutes and register were received, admitted, and read, and a verdict was found for the defendant. In the following term, *Taunton* obtained a rule to set aside this verdict, on the ground that the evidence was not admissible, against which,

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*Campbell* and *R. V. Richards* now shewed cause. The entry in the register was *prima facie* evidence; nor is its authority destroyed by shewing it to have been made by a person who was not the incumbent at the time the baptism took place. [*Littledale, J.* By the 70th Canon (a), the names of all persons baptized are to be entered in the register at the end of every week. *Parke, J.* A register is evidence as a document made up by a public officer, whose duty it is to prepare such a document; here the entry is made by a person wholly unconnected with the parish at the time the baptism is supposed to have taken place.] But supposing this circumstance to take away from the authority of the entry, its credit is restored by shewing that it was prepared from minutes furnished by a party whose office required that he should be present when the ceremony was performed. If the clerk had made the entry in the lifetime of *A.*, the register would have been evidence of the baptism. So here, where it is made from minutes drawn up by the clerk in the lifetime of *A.* [*Bayley, J.* Where the clerk makes the

(a) 3 Burn. Eccl. Law, 290.

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entry in the 'lifetime of the minister, the Court would presume that the former was authorized by the latter to make the entry; but an entry made after his death cannot be presumed to have been made by his authority.]

*Taunton* and *Maule*, contra, were stopped by the Court.

BAYLEY, J.—We are of opinion that this rule must be made absolute. Entries in parish registers should be made promptly, and they should be prepared by the persons whom the law has appointed for that purpose. Here the entry was delayed for a year and a half, and until after the death of the incumbent, when it was made by a person acting merely upon the information of the clerk. Then with regard to the second point, as it was not the duty of the clerk to make such entries, his minutes must be considered as mere private memoranda. In *May v. May* (a), the day-book in which the original entries were made, and from which they were posted into the register once in three weeks, was held to be inadmissible. And the editor of Burn's Ecclesiastical Law makes an observation to the same effect (b). So in *Newham v. Raithley* (c), it was held that the copy of a register kept

(a) 2 Stra. 1072; Bull. N. P. 112.

(b) 3 Burn, E. L. 293.

(c) 1 Phillimore, 315. In that case it was said by the learned judge, Sir John Nicholl, that the register itself might be evidence to a certain extent at the hearing. No notice appears to have been taken of statute 25 Geo. 3, c. 75, which imposed a stamp duty upon "the registers of births, burials, and christenings of his majesty's protestant subjects dis-

senting from the church of England," and may perhaps be considered as a legislative recognition of such registers. The duty had been imposed upon parochial registers, and had been extended to the registers of quakers by 23 Geo. 3, c. 67, s. 8. All these duties have been since repealed. In *Huet v. Le Mesurier*, 1 Cox, 275, a register kept in Guernsey appears to have been rejected, as not having been kept under a sufficient ecclesiastical authority.

at a dissenting chapel, could not be pleaded in evidence in the Ecclesiastical Court, on the ground that such a

*Ex parte Taylor*, 1 Jac. & Walk. 483. "This was a petition for payment of a legacy that had been invested in the funds in the name of the accountant-general, under the statute 36 Geo. 3, c. 52, s. 32, the legatee having attained 21. To prove his age an examined copy of an entry in the register of the births of dissenters' children, kept at Dr. Williams's Library in Redcross-street, was produced. The Master of the Rolls (Sir W. Grant) thought it was not evidence that the Court could act on." The institution in which that register was kept is a library founded by Dr. Daniel Williams, a presbyterian minister, in the beginning of the last century, for the use of ministers of the three denominations into which the dissenting body, with the exception of the quakers, was then divided, presbyterians, independents, and baptists. From the year 1740, protestant dissenters of the three denominations have registered the births of their children at this library. The register is entered in books prepared from certificates on parchment, which are also preserved in the library. Until the above decision in *ex parte Taylor*, the certificates were in the following form:—

"These are to certify that A., the son of B. D., and C. his wife, who was the daughter of E. F., was born at X., in the parish of

Y., in the county of Z., on the day of , in the year , at whose birth we were present.

(Signed) G. H.

I. K.

"We do certify that the abovenamed A. D. is our son, and was born at the time and place above mentioned.

(Signed) B. D.

C. D."

After that decision it was considered that the certificate was available only as a declaration by the parent, and equivalent to an entry by a parent in a Bible, Prayer Book, &c.; and in order to give it more force as such declaration, the following form is now adopted:—

"Dated the day of

"This is to certify and declare, that A., the son of B. D., of X., in the county of Y., and C. his wife, who was the daughter of E. F., of , in the county of Z.) was born at the house of the said B. D., No. , street, in the county of Y., on the day of 18 .

B. D. } The parents above  
C. D. } named.

"We certify and declare that we were present at the birth of the child above mentioned, and that such birth took place at the time and place aforesaid.

G. H., of , spinster, aunt  
to the child.

I. K., of , surgeon."

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register, not being a public document in official custody, must be considered as a private memorandum.

### Rule absolute(a).

(a) By 52 Geo. 3, c. 146, it is enacted, sect. 1, that registers of public and private baptisms, marriages and burials, solemnized according to the rites of the united Church of England and Ireland, within all churches or chapelries in England, shall be kept by the rector, &c. in books of parchment, or of durable paper.

In France, every birth must be communicated, within three days of the event, to the civil authorities, who are to make a full and minute record of the occurrence.

“ Les déclarations de naissance seront faites, dans les trois jours de l'accouchement, à l'officier de l'état civil du lieu : l'enfant lui sera présenté. La naissance de l'enfant sera déclarée par le père ou, à défaut du père, par les docteurs en médecine ou en chirurgie, sages-femmes, officiers de santé, ou autres personnes qui auront assisté à l'accouchement; et lorsque la mère sera accouchée hors de son domicile, par la personne chez qui elle sera accouchée. L'acte de naissance sera rédigé de suite, en présence de deux témoins. L'acte de naissance énoncera le jour, l'heure, et le lieu de la naissance, le sexe de l'enfant et les prénoms qui lui seront donnés, les prenom, noms, profession, et domicile des père et mère, et ceux

des témoins.” Code Napoléon, numm. 55, 56, 57. Two copies of every entry of births, (as also of marriages and burials,) are made, and every leaf is signed by the president of the tribunal de première instance. At the end of each year the registers are closed by the mayor, and one copy is deposited in the archives of the mayoralty, and the other at the register-office of the tribunal de première instance.

Some provision of the like nature was attempted to be introduced into this country when the above statute was under discussion. It was urged that the parish register of baptisms embraced only one class of the community, and would, therefore, often afford little or no assistance in tracing a pedigree; and that supposing all classes to be included, the register gave no other information as to the period of the birth than that the party must have been born before the date of the entry in the register. It was, however, considered to be a hardship on the clergy to deprive them of the privilege of registering the baptisms of persons within their own communion, and that it would be degrading them to require that they should make entries with respect to the children of persons who were not within the pale of the established church.



With respect to the three important events of birth, marriage, and death, the legal public evidence appears to stand thus: The period of birth is to be sought for by the inspection of one or more out of about 10,000 parish registers, kept by persons unused to the minutiae of accurate and formal entries, embracing about one half only of the population, and throwing no other light upon the period of birth of the party whose name is there recorded, than by proving that he was alive on a particular day, any accompanying memorandum as to the day of the birth being inadmissible. With respect to marriages, however, the registers are more satisfactory. They extend to all sects except two, (Quakers and Jews,) whose peculiarities will in general prevent any mis-

take in searching for the evidence of their marriage. There exists no register of deaths, but the interval between death and sepulture seldom raises any legal question; and therefore with respect to those who are buried by the ministers of the established church, we have a register which, if regularly kept and easily accessible, would answer every purpose of a register of deaths. The portion of the community whose interments are thus registered exceeds that whose baptisms are to be found in the parochial registers, inasmuch as many dissenters are buried in our public cemeteries, who either reject the rite of baptism, or receive it from ministers of their own persuasion, whether as children or as adults.

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### The KING v. The Inhabitants of RINGSTEAD.

**TWO** Justices, by their order, removed *Henry Manning*, *Rebecca* his wife, and their four children, from the parish of Wellingborough, in the county of Northampton, to the parish of Ringstead in the same county. On appeal, the Sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The birth settlement of the pauper *Henry Manning*

marriage, *A.* and also messuage *B.*, of which the testator made no other disposition, were devised to *N.*, who was not heir of the devisor, in fee:—Held, that *N.* took no estate in *A.* or *B.* till after the death or marriage of *M.*, during whose widowhood *B.* descended to the heir of the devisor; and that, therefore, *N.* gained no settlement by residing in the parish where the messuages were situate, while *M.* continued alive and unmarried.

To gain a settlement by estate, the party must have an estate in possession.

Messuage *A.* was devised to *M.*, durante viduitate, and after her decease or re-

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was in the parish of Ringstead. His grandfather *Thomas Manning* being seised in fee of the premises hereinafter mentioned, by will dated 6th January, 1800, duly executed and attested, (after devising five acres of land in Ringstead to his eldest son and heir *John Manning* in fee in the words following, that is to say, I give and devise unto my son *John Manning* all those my five acres, more or less, of copyhold meadow ground, with their and every of their appurtenances, lying and being dispersed in the open and common fields and meadows of Ringstead aforesaid, now in my own occupation, and which I have duly surrendered to the use of this my will, to hold to him, his heirs and assigns, for ever, subject nevertheless, and I do hereby subject and charge the same estate to and with the payment of 25*l.* of lawful money of Great Britain, unto my daughter *Mary*, the wife of *Thomas Plant*, to be paid to her within twelve calendar months next after my decease,) gave and devised in the words following, that is to say, " I give and devise unto my daughter *Elizabeth*, the wife of my late son *Thomas Manning*, *all that part of a messuage or tenement, with the appurtenances*, which is now in the occupation of *Henry Lawford*, situate in Ringstead aforesaid, and adjoining to the tenement in the occupation of *Joseph Manning*, to hold to her the said *Elizabeth Manning*, and her assigns, for and during the term of her natural life, if she shall so long continue a widow, and unmarried, and from and after her decease or day of marriage, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances, and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of *Joseph Manning*, and also all that my close or orchard, lying about the said homestead on the north side of a back lane, and now in the several tenures of myself, *Samuel*

*Hackett*, and *Mary Whitney*, unto the four children of my late son the said *Thomas Manning*, deceased, namely, *Henry*, *John*, *Thomas*, and *Rebecca Manning*, to hold to them and to their several and respective heirs and assigns for ever, as tenants in common and not as joint tenants." The pauper is the *Henry Manning* mentioned in this last-mentioned devise, and is the son of the said *Elizabeth Manning*. In 1806 the pauper acquired a settlement by hiring and service in the parish of Raunds. Having some years afterwards become chargeable to Ringstead, he was removed, with his wife, to Raunds, by an order dated 8th January, 1817, which order was never appealed against. Between 1817 and 1819, when the property was sold to one *Moss*, he resided above forty days in the parish of Ringstead, his mother having up to that time continued, and then being, a widow, and unmarried.

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*Dwarris* and *Amos*, in support of the order of sessions. The fact of the pauper's sufficient residence in Ringstead being found by the case, the only question is, whether he had a sufficient estate to confer a settlement. It has certainly been decided that a party must have a present interest in an estate, in order to acquire a settlement, by residence upon it (*a*), *Rex v. Eatington* (*b*); but up to the time of that decision it had been

(*a*) It is not only necessary that the interest should be certain; but it must likewise be vested in possession. An estate in remainder or reversion does not confer a settlement any more than one in contingency or expectation; for the party has nothing of his own to superintend, which is the reason why he is rendered irremovable. 2 Nolan, 88.

(*b*) 4 T. R. 177. There, *G. M.* being seised in fee of a cottage, by indentures of lease and release, in consideration of 36*l.* therein mentioned to be paid, granted and conveyed the cottage in fee to the pauper, his son-in-law. The release contained the following proviso:—"Provided, that it shall and may be lawful for the said *G. M.* to live,

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held that a party having an estate in the parish where he resided was not sufficient to confer a settlement, unless he resided upon the estate (a). That doctrine was afterwards exploded in the case of *Rex v. Houghton-le-Spring* (b), where it was decided that the owner of an estate had a right to reside in the parish where his property was situated, whether he occupied it himself, or

inhabit, dwell in, and occupy, the said cottage or tenement, with the appurtenances, as he heretofore hath done, and now does, for and during the term of his natural life." The pauper and his wife resided with G. M. for three months, until they were removed. It was held that the word *occupy* used in the conveyance, shewed that it was the intention to reserve a life estate in the whole cottage to G. M., and not merely a liberty to dwell in it during his life. The pauper, therefore, had only an estate in remainder, which had not come into possession at the time of the removal, and, consequently, he had not that which was necessary to confer on him a settlement, namely, a present interest.

(a) *Query*.—Is not this proposition somewhat too large? It does not seem to be supported, to its full extent, by any of the cases to be found in the books. In *Rex v. Houghton-le-Spring*, 1 East, 254, *post*, 75, (a), where the contrary doctrine was established, and which has ever since been maintained, much doubt was entertained by *Lawrence, J.* and *Le Blanc, J.*, whether a person could acquire a settlement by

a residence in a parish where his property lay, but of which he was not in the occupation. The cases of *Ryslip v. Harrow*, 2 Salk. 524; *Rex v. St. Nyotts*, Burr. S. C. 133; and *Rex v. Sowton*, Burr. S. C. 123, they thought left the matter doubtful as to the occupation; at length, however, they all agreed that the case of *Rex v. Hasfield*, Burr. S. C. 147, *post*, 75, (a), was decisive in favour of a settlement being gained, notwithstanding the occupation was in a tenant. See *Lewin on Settlements*, 436, (1). Now the cases alluded to do not seem to warrant even the doubt said to have been entertained. In *Ryslip v. Harrow*, *Holt, C. J.* said, "Having land in a parish will not make a settlement, but living in a parish where one has land will gain a settlement without notice." In *Rex v. St. Nyotts*, it was held that a pauper could not be removed to a place where he had an estate of his own, unless he had been resident there, irremovable, forty days; but that afterwards he might. And in *Rex v. Sowton* it was expressly said that the residence need not be on the estate.

(b) 1 East, 247. See *post*, 75, (a).

let it to a tenant (a). In this case, therefore, if the pauper took an estate in fee under the will expectant upon the death or marriage of his mother, he had as much right to reside in the parish as if he had a reversion after a term of 1000 years. But it is clear that the pauper in this case took under the will a present interest in the estate. It was evidently the object of the testator to provide for all his family, and the will must be construed distributively for the purpose of effectuating that object. Now the will makes a provision, first, for the eldest son and heir, secondly, for the widow of the second son, and lastly, for the grandchildren. The testator did not intend to die intestate with respect to any part of his property, but if the grandchildren did not take a present interest under his will, part of his intention must be defeated, for then he has made no provision for their maintenance, which he plainly intended to do. The proper construction of this will is, that the testator gave to his grandchildren, immediately, all the property he devised to them, excepting only that which he had previously

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(a) If the estate be vested, the premises need not be in the owner's actual occupation; 2 Nolan, 89. In *Rex v. Hasfield*, Burr. S. C. 147, where an infant of the age of six years and a half became seised of a freehold estate, and resided in the parish with his grandmother, it was held that he could not be removed. In *Rex v. Houghton-le-Spring*, the pauper was entitled to three copyhold and one freehold house, as heir at law to his cousin. He agreed to let the freehold house, which was in Sedgefield parish, to *W.*, at 3*l.* per annum, the pauper undertaking to sink a cellar, and

make some repairs. *W.* accordingly entered and occupied the premises as a public house, and the pauper, after such possession by *W.*, went to Sedgefield for the sole purpose of sinking the cellar, and making the repairs, during the whole of which time he resided as a lodger in *W.*'s house. He was held to gain a settlement, upon the principle that residence in the parish in which the party has a freehold estate, confers a settlement, whether he resides on the estate or not, or whether or not he is in the occupation thereof. For a man, though not in the occupa-

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expressly devised to their mother; *Cook v. Gerrard* (a); *Simpson v. Hornsby* (b); *Doe v. Brazier* (c).

*Campbell, Humfrey, and M'Dowell*, contrà. It is an established principle in the law of settlements, that in order to acquire a settlement by estate, the party must have a freehold in possession—an estate of which he may be disseised. [*Bayley, J.* We none of us entertain any doubt upon that point.] Then the only point is upon the construction of the will. Now so long as his mother continued alive and unmarried, the pauper took only a freehold in futuro by way of executory devise, and not any present estate, under the will. It is said the testator intended the devise to his grandchildren to be immediate, but that is by no means clear; that may, or may not, have been his intention; it is a matter of doubt upon the face of the will, and an heir at law cannot be disinherited upon doubts; there must be either express words or necessary implication to oust the heir at law (d).

tion of his own estate, may have many reasons for wishing to live in the neighbourhood of it, and is entitled to the privilege of superintending it. And see *Rex v. Dorstone*, 1 East, 296; *Rex v. Horsley*, 8 East, 405; *Rex v. Brington*, 7 B. & C. 546; 1 M. & R. 431; *ante*, vol. i. 122.

(a) 1 Saund. 181.

(b) Prec. in Ch. 439, 452.

(c) 5 B. & A. 64. These three cases are fully detailed, and the points in which they are distinguishable from the principal case clearly defined by *Bayley, J.*, in the judgment, *post*, 82, et seq.

(d) It is said that an heir at law cannot be disinherited by the plainest intention apparent upon the face of a will, unless

the estate be completely disposed of to somebody else. *Denn v. Gaskin*, Cowp. 661. And that he takes, although clearly intended to be excluded, if it do not appear with certainty to whom, or in what proportions, the estates are devised. *Shulldham v. Smith*, 6 Dow, 22. And see the judgment of *Best, J.* in *Doe v. Turner*, 2 D. & R. 403. Notwithstanding the strong expressions and an air of mystery which are to be found in these and in other cases, the principle of law appears to be simply this, that so far as there is no *effectual* devise of lands and tenements, the common law will take its course. It seems to have been forgotten in those cases, as it was *at first*, (*Fearne, C. R.* by

It is equally consistent with the language of the will, to say that the testator intended all the property to go to his grandchildren at once upon the death or marriage of their mother; that he depended upon her providing for them so long as she lived and remained a widow, and therefore did not mean them to take under the will until that provision should cease by her death or marriage. The cases cited on the other side are all distinguishable from the present. *Doe v. Brazier* (a), is the most like it; but there the devise to the nephews was in danger of failing altogether, unless it gave them an immediate estate; a circumstance which seems to have had much effect upon the Court in deciding that they took an immediate estate. The true rule with respect to the exclusion of the heir at law was laid down by *Wilson, J.*, in *Habergham v. Vincent* (b), "that, whether the estate was meant for the heir or not, the intention is not material, if it is not given to some other person; for there is no other way to exclude an heir than by giving it to somebody else: therefore, if from the circumstance of part being so given, an inference could be raised, that the testator meant the heir should have no more; yet, even against that intention, the heir would take" (c). So, in *Comyns's Digest* it is said (d), "there shall not be a strained construction of words to disinherit an heir; and, therefore, whatever is not expressly disposed of descends to the heir." So, in *Coryton v. Hillier* (e), Lord *Hardwicke*, in the course of his judgment said, "In constru-

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Butler, App. 573,) in *Doe d. Bailey v. Pugh*, (2 Meriv. 348, 9,) that the law of England contains no provision for disinheriting an heir, though it allows the ancestor, by alienation taking effect during his life or at his death, to render the heirship of little value.

(a) 5 B. & A. 64.

(b) 2 Ves. jun. 225.

(c) *Et vide Snelgrove v. Snelgrove*, 4 Deaus. Cha. Rep. 301, 303.

(d) Com. Dig. *Devise*, N. 22.

(e) 1 Ves. & Bea. 466.

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ing a will, conjecture must not be taken for implication; but necessary implication means, not natural necessity, but so strong a probability of intention, that the intention contrary to that imputed to the testator cannot be supposed." There are many other cases in which similar principles in support of a construction favourable to the heir, where there is no express devise of the property to another, have been recognised and acted upon. They cited, upon this point, *Stanfield v. Habergham* (a); *Hopkins v. Hopkins* (b); *Jones v. Mitchell* (c); *Tregonwell v. Sydenham* (d); *City of London v. Garway* (e); *Right v. Sidebotham* (f); and *Denn v. Gaskin* (g).

The case was argued at the sittings after Trinity term, 1828, when the Court took time for deliberation; judgment was now delivered by

BAYLEY, J.—The question in this case was, whether the pauper acquired a settlement by estate in the parish of Ringstead. That question depended entirely upon the construction to be put upon the will of his grandfather. If that will gave him an immediate estate, the pauper is settled in Ringstead; if it did not, he is not settled there. The words of devise upon which the question turns are these:—"I give and devise unto my daughter *Elizabeth*, the widow of my late son *Thomas Manning*, all that part of a messuage or tenement, with the appurtenances, which is now in the occupation of *Henry Lawford*, situate in Ringstead, and adjoining the tenement in the occupation of *Joseph Manning*, to hold to her the said *Elizabeth Manning*, and her assigns, for and during the term of her natural life, if she shall so

(a) 10 Ves. 273, 280.

(b) 1 Atk. 581.

(c) 1 Sim. &amp; Stn. 290.

(d) 3 Dow, 194.

(e) 2 Vern. 571.

(f) Dougl. 759.

(g) Cowp. 657.



long continue a widow and unmarried, *and from and after her decease or day of marriage*, which shall first happen, I give and devise the said part of a messuage or tenement, with the appurtenances, and also all that the aforesaid tenement, with the homestead and appurtenances, in the occupation of *Joseph Manning*; and also all that my close or orchard lying about the said homestead, on the north side of a back lane, and now in the several tenures of myself, *Samuel Hackett* and *Mary Whitney*, unto the four children of my late son the said *Thomas Manning*, deceased, namely, *Henry, John, Thomas, and Rebecca Manning*, to hold to them and to their several and respective heirs and assigns for ever, as tenants in common, and not as joint tenants." The question is, whether by that devise the testator intended to give his grandchildren an immediate estate in the property not devised to their mother for life. On the one hand, it has been contended, that the children take no present estate in the property not devised to the mother, but a freehold in futuro, by way of executory devise (a); on the other, that though they take a remainder only in the property devised to the mother for life, they take a present estate in the property not devised to her, and that the words "from and after her decease or day of marriage," must be construed distributively, so as to confine them to the property devised to the mother

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(a) During the widowhood of the mother, the whole fee in the property not devised to her for life would vest in the heir of the devisor, since an heir cannot take by descent a particular estate of freehold. It has, however, been laid down, (Fearn, C. R. 8th ed. 40; Sanders Uses, 141; Gilb. Uses, by Sugden, 119, n.) upon

the supposed authority of a passage in Co. Litt. (23, a.) which must be mutilated in order to support the position, that a covenantor in a covenant to stand seised, or a grantor, &c. may take a particular estate of freehold by way of *resulting use by implication*. And see this position examined in Hayes's Principles, 63, 67, &c.

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for life, and to leave the residue unaffected by them. If the latter be the true construction, the pauper and the other children of *Thomas* and *Elizabeth Manning* take an immediate estate in the residue. Now, for the purpose of furthering the manifest intention of the testator, there is no doubt that general words which, taken in their ordinary grammatical sense, apply to all the property devised, may be taken distributively, and that, reddendo singula singulis, they may be applied to that part of the property only to which they appear by the context to be applicable, so as to suffer the residue of the property, to which in their grammatical sense they would apply, to pass immediately. But, in order to warrant such a construction, it must appear clearly and without doubt from the other parts of the will, that such was the intention of the testator. If, therefore, there be nothing to shew that such was the intention of the testator in this case, the words of the devise, being general, must be construed in their ordinary grammatical sense, in which case they will apply to the whole of the property, and prevent any part of it from passing immediately to the children; and that part of it which is not devised to the mother, will pass to the heir at law during her life. (a). It is a general rule, that the heir at law cannot be disinherited, except by express words or necessary implication; and a necessary implication means such a strong probability, that an intention to the contrary cannot be supposed (b). Thus, if the devise be to

(a) i. e. a fee will descend to the heir defeasible upon the taking effect of the executory devise. Even where the *period* as well as the *event* is certain, as where the devise is "to my heir from the end of a year from my death," the

result will be the same. *Vide* *Fearne*, C. R. Introduction, n. (a).

(b) An implication to raise an estate must be a necessary and inevitable implication; *Cas. temp* Talb. 3; or, at least, highly probable; 2 *Bla. Com.* 381; so clear

the devisor's heir after the death of *A.*, an estate for life arises to *A.* by implication; but if the devise be to *B.*, a stranger, after the death of *A.*, no estate arises to *A.* by implication, but the devisor's heir takes during the life of *A.* In the first case, the inference that the devisor intended to give a life estate to *A.* is irresistible, because he could not, without the grossest absurdity, be supposed to mean to give his land to his heir at the death of *A.*, and yet that his heir should have it in the mean time; but where the devise is not to the heir, but to *B.*, a stranger, however probable it may be that by fixing the death of *A.* as the period when the devise to *B.* is to take effect in possession, the devisor intended that *A.* should take it for life, still it is possible to suppose, that, intending the land to go to his heir during the life of *A.*, he left it for that period undisposed of; and, therefore, in that case it goes to the heir. In this case there is no express devise of the property in question during the life of the mother; the children are not the heirs at law of the testator, but strangers: therefore, upon the principle that the heir at law cannot be disinherited except by express words or necessary implication, the devise to the children after the death of the mother gives them an interest which is to take effect only at her death, and the heir at law is entitled to the property during her life. The cases relied upon as shewing that the words of this

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as to satisfy the conscience of the Court, and the reasonable doubts of every one; *Wright v. Holford*, Cowp. 31; not merely possible; 2 Bla. Comm. 381; or resting upon conjecture; *Cave v. Halford*, 3 Ves. 676. It is not, however, required that the inference shall have the force of a mathematical demonstration, and be absolutely irresistible; it is suf-

ficient if the whole circumstances, taken together, leave no doubt in the mind of the judge who has to decide; provided the question be not of a nature to exclude all implication. *Hartley v. Hurtle*, 5 Ves. 546; *Bootle v. Blundell*, 19 Ves. 517; *Wilkinson v. Adam*, 1 Ves. & Bea. 466; *Gittins v. Steele*, 1 Swanst. 28; 2 Bla. Com. 382, n. (14,) 18th ed.

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devise ought to be construed distributively, were *Cook v. Gerrard* (a), *Simpson v. Hornsby* (b), and *Doe v. Brazier* (c). In the first of those cases, Sir Robert Kempe, Knight, was seised of the lands in question in fee, and was also seised of the reversion of other lands expectant upon the death of *Ruth Kempe*, his daughter-in-law, (whereof *Ruth* had an estate for life for her jointure,) and being so seised, the said Sir Robert Kempe by his will devised, that Dame *Elizabeth*, his wife, should have the free use of the demesne lands (being the lands in question) for one year after his death; and then, after stating that he was desirous to continue the capital mesuage, with the appurtenances thereto belonging, in the blood of the *Kempes*, in which it had continued for ages past, he devised the demesnes and the reversion to the lessor of the plaintiff, habendum immediately from and after the expiration of one whole year next after his decease, and the decease of the said *Ruth Kempe*, (who was tenant for life of the lands whereof the testator had the reversion,) for the term of the life of the said *Thomas Kempe*, the lessor of the plaintiff, doing no strip or waste. The testator further directed, that *Thomas Kempe*, in consideration of the devise, should, immediately after the death of *Ruth Kempe*, pay to three persons, in the will mentioned, annuities of 20*l.* each, in half-yearly payments. The testator died, and the year expired. It was contended that it was necessary, in order to effect the intention of the testator, that the words should be taken distributively, so that the devisee should have the reversiory lands after the death of *Ruth*, and the demesne lands after the death of the testator; and on three grounds:— first, because if they descended to *Mary Kempe*, his daughter and heir, she would probably change her name

(a) 1 Saund. 183.

(c) 5 B. &amp; A. 64.

(b) Prec. in Chan. 439, 452.

by marriage, and then the testator's intention, that the demesne lands should remain in the name of the *Kempes*, would be defeated; secondly, that if *Ruth* died within the year after the testator, the annuities given by the will could not be paid, unless the devisee took the land immediately upon the death of *Ruth*, notwithstanding the year was not expired; and, thirdly, that if the demesne lands should descend to the heir in the mean time until the death of *Ruth*, then he might commit what waste he pleased, and there would be no means to prevent him, which would be directly against the true meaning of the testator. On the other hand it was insisted, that the demesne lands should descend to the heir at law until the death of *Ruth*, and that the words of the will should be taken as they were, jointly and not distributively; and the rule that the heir at law is not to be disinherited but by express words or necessary implication was relied on. The Court of King's Bench held, that the words of the will should be taken distributively, and that the lessor of the plaintiff had good title to the demesne lands after the expiration of the year, and before the death of *Ruth*; and judgment was given for the plaintiff. In the course of the argument, this case was cited from *Moore's Reports*, (a). "A man seised of a manor, parcel in demesne and parcel in service, by his will devised to his wife all his demesne lands for her life; and also by the same will devised to her all the services and chief-rents for fifteen years; and further devised all the manor to another after the death of the wife; and it was adjudged that the devisee should take nothing until after the death of the wife, although the fifteen years had expired, and that the heir, at the expiration of the fifteen years, should have the services and chief rents during the wife's life." In argument in the Exchequer

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(a) Trin. 3 *Edw.* 6, F. Moore, 7.

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Chamber, this case was relied upon in support of the writ of error. "To which *Saunders* gave this answer, namely, that there the second devisee was to take nothing by the words of the will until after the death of the wife; and the words being express, no construction could be made against them, which, he said, was the reason of the case; but he said that if the will had been, that the second devisee should have all the manor after the expiration of the fifteen years, and after the death of the wife, in that case it should be construed distributively, as in this case, namely, that the second devisee should have the demesne lands of the manor after the death of the wife, and the rents and services after the expiration of the 15 years." And that was a good answer, for if the devise in that case had been as *Saunders* hypothetically puts it, it would have clearly manifested the intention of the testator to give to the second devisee the reversion of all the lands he had previously given to his wife for life and for years, and then, in furtherance of that intention, the words must have been construed distributively; but as no part of the will manifested any such intention, the words were taken in their ordinary grammatical sense, and at the end of the 15 years, the heir at law took the chief rents and services for the life of the wife. The judgment of this Court in *Cook v. Gerrard* was afterwards affirmed in the Exchequer Chamber. But in that case also, there were circumstances shewing that the testator must have intended the heir at law not to take the demesne lands during the lifetime of *Ruth*; first, because he expressed his wish that they should continue in the name of *Kempe*; secondly, because he directed annuities to be paid half-yearly immediately after the death of *Ruth*; and thirdly, because he directed that no waste should be committed; so that the only effect of that case is to shew that in furtherance of

the manifest intention of the testator, words, which taken in their ordinary grammatical sense are joint and apply to two classes of property, *may* be construed distributively; not that they *must* be so construed. The next case relied upon was *Simpson v. Hornsby* (a). In that case the testator had a wife, and two daughters, his heirs at law, and he devised his estates to his wife for life, and then to one of his daughters after the death of his wife. Now a devise to an heir at law after the death of the wife, gives the wife a life estate by necessary implication, because the intent is plain that the heir shall not take till after the death of the wife (b). The case of *Hutton v. Simpson*, as reported by *Vernon* (c), is cited in *Viner's Abridgment* (d) as an authority to shew, that a devise to one of two daughters, being heirs at law, after the death of the devisor's wife, gives an estate for life to the wife by implication, though no mention is made of the other daughter and heir. But in that respect *Vernon's* report is at variance with that in the *Chancery Precedents* (e), and also with the account in the Register Book, which I have examined. According to the latter, the case was this:—*Thomas Addison*, the testator, had a wife, *Frances*, and two daughters, *Bridget* and *Jane*. He devised to *Frances Addison*, for her life, as a jointure, all his messuages, houses, lands, tenements and rents in Turpen-tine, in the county of Cumberland, (the house called James House, and the lands devised to buy bread weekly

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(a) Prec. in Chan. 439, 452.

(b) If a husband devise the goods in his house to his wife, and that after her decease his son shall have them, and his house; though the house be not devised to the wife by express words, yet it has been held, that she has an estate for life in it by implica-

tion, because no other person could then have it, the son and heir being excluded, who was to have nothing till after her decease. 1 Vent. 228.

(c) 2 Vern. 723.

(d) 8 Vin. Abr. 355, pl. 29.

(e) Prec. in Chan. 439, 452.

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for the poor of the parish only excepted,) and bequeathed to her specific articles of furniture, &c., all which he bequeathed to her, and were thereby intended and declared to be in full of her jointure, and in lieu of her dower, or thirds, at common law or in equity, or by any local custom; and after the death of his said wife, devised all his houses, messuages, lands, tenements, rents, fines, heriots, boons, duties, and services, in Turpentine aforesaid, (except as before excepted,) and all his houses, messuages, lands and tenements in Whitehaven, his tenements in Bigg Croft, and all other his real estate whatsoever, not before devised, unto his daughter *Bridget Addison*, and the heirs of her body to be begotten; and, for want of such issue, to the said *Jane*, his daughter, for her life, and after her decease to the first, second, third, &c., sons of his daughter *Jane*, and the heirs of the body of such son and sons successively; and, for default of such issue, to the daughter and daughters of the said *Jane*, the wife of *Simpson*, and the heirs of the body of such daughter and daughters, as tenants in common, and not as joint tenants; and, for want of such issue, to the said *Thomas Addison*'s right heirs for ever; and he made the said *Bridget Addison*, his daughter, sole executrix, and the defendants *Gilpin*, *Blacklock*, *Coates*, and *Senhouse*, overseers of his will. *Bridget* married *Hutton*, and had issue *Addison Hutton*, and died in the testator's lifetime. *Jane* married *Simpson*. After the testator's death, *Simpson* and his wife filed a bill against *Frances* the widow, and the overseers of the will, charging, that *Frances* pretended she was entitled not only to the lands in Turpentine, but to all the testator's other lands for life, and that she possessed the title deeds of his real estate, and refused to discover the same; and pretended also, that after her death *Addison Hutton* would take as heir of *Bridget*'s body; and prayed, *inter alia*, an account of



the rents of the real estate. *Frances* put in her answer, but died before the hearing; and the suit was revived against her executors. *Richard Hutton* and *Addison*, his son, also filed a bill against *Frances Addison* and the overseers of the testator's will, and prayed that *Richard Hutton* might have the management of the lands given to *Bridget* and the heirs of her body. This bill was also revived on the death of *Frances*. On the hearing of both causes, Lord Chancellor *Cowper* was of opinion that *Frances* took nothing by implication, and that she was entitled to a life estate in those lands only which were expressly devised to her; that *Bridget*, had she survived the testator, would have taken the other lands immediately upon the testator's death, and that she was to wait for the death of *Frances* for those lands only which were given to *Frances* for life; and that as *Bridget* died in the testator's lifetime, *Jane* became entitled to the lands not expressly devised to *Frances*, immediately upon the testator's death, and might have entered thereon; but as she had not entered, he refused an account against the personal estate of *Frances*, and dismissed the first bill; and as *Jane* had profited so much by an unforeseen accident, the Lord Chancellor left *Jane* to her remedy at law against the *Huttons*, for an account of rents, and retained *Hutton's* bill, that he might, if he thought fit, try the title at law; and if he did not, the deeds were to be delivered to *Jane*: but the Lord Chancellor stated that the present title to the estate was merely a question of law, and that there was no impediment to try it at law. The only question was, not whether the estates had come into the possession of *Jane*, but whether there ought to be an account of the rents and profits. In the first case the Lord Chancellor thought that, *Simpson* not having entered, he and his wife were not entitled to an account; and he dismissed

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the bill on that ground. The question, therefore, whether *Jane* was entitled to the actual possession upon the death of *Frances*, the tenant for life, could not arise; and there could be no appeal against the decree upon the ground of any opinion expressed by the Lord Chancellor as to the period of time when the property vested. In the other case the bill was dismissed as to the rents and profits, because as *Jane* had profited so much by an accident unforeseen to the testator, it was thought that she might properly be left to recover them at law. Neither of those cases, therefore, necessarily involved the question, whether the devisee took an estate immediate upon the death of the testator. It was contended that the son of *Bridget* was entitled to the estate at the death of his mother; but the Lord Chancellor was of opinion that the words "heirs of the body," as used in the will, were used only as words of limitation of the estate devised, and not as words of purchase or description of the person intended to take, and therefore, that *Addison Hutton* could not, by virtue of those words, take by purchase or immediate devise; and consequently that the estate devised to *Bridget* and the heirs of her body vested immediately on the death of the testator (*Bridget* being previously dead) in *Jane*. A question was made whether *Jane* was so entitled, and it was contended that she was not entitled until after the death of *Frances*, the widow, because *Frances* took an estate for life by implication in the whole. The Lord Chancellor thought that *Frances* took no estate by implication in the lands not expressly devised to her, and that *Bridget* took a remainder in those lands only which were expressly devised to *Frances*; *the other lands being clearly intended to pass by the will immediately to Bridget, if Bridget survived the testator.* It is evident from this statement of that case, that the Lord Chancellor was of opinion that the widow took no

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estate by implication in the lands not expressly devised to her, but that those lands were *intended* to pass by the will *immediately* to *Bridget*; and that in order to give effect to that intention, he construed the words of the devise distributively, reading the devise as if the testator had given specific lands to his wife for life, and after her death to *Bridget*; and as if he had given his other lands immediately to *Bridget*, without any qualification or contingency; and his ground for distributing the words was, that there was a necessity for so doing, in order to effect the intention of the testator, apparent upon the face of the will, that those lands should pass immediately to *Bridget*. The same observation applies to the remaining case of *Doe v. Brazier* (a). There the testator bequeathed the rents of a dwelling-house situate in New Brentford to *Charles Brazier* for his life, and after his decease he bequeathed the same rents, *together with* the rents of all his other messuages and lands, to his three nephews and niece, for their lives and the life of the survivor, share and share alike; and after the decease of the survivor of them, he devised all his messuages and lands to trustees in trust to sell the same, and pay over the produce of such sale unto such of the children of his nephews and niece as should be living at the time of the decease of the survivor of them; and then devised all the residue of his estate to *Charles Brazier*, to hold to him, his heirs and assigns for ever. It was held, that on the death of the testator, the nephews and niece took an immediate estate for their lives and the life of the survivor in the rents of all the houses and lands, except the house specifically bequeathed to *Charles Brazier* for his life. The ground of that decision was, that it was apparent, on the face of the will, that although the testator intended to give *Charles Brazier* a life estate in

(a) 5 B. &amp; A. 64.

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one house only, he yet intended to dispose of his property in the other houses, which latter intention could only be effected by giving to the nephews and niece an immediate interest in the other houses; and therefore the Court, in order to effect the manifest intention of the testator, were compelled to give to the words a construction different from that which belonged to them in their ordinary grammatical sense. In the present case there is nothing in the will to shew that the testator intended to give his grand children upon his death an immediate interest in the property devised, or that he meant to disinherit his heir at law; and that being the case, we must construe the words of the will in their ordinary grammatical sense. Upon this principle we are of opinion that the pauper did not take an immediate estate under the will of his grandfather; that he is entitled to no estate whatever until the tenant for life dies; and therefore, that, as he had no present interest at the time when he resided at Ringstead, which, in order to acquire a settlement, it is clear from *Rex v. Eatington* (a), and other authorities, he must have, he gained no settlement by his residence in that parish. The removal to Ringstead, therefore, was wrong, and the order of sessions confirming it must be quashed.

#### Order of Sessions quashed (b).

- (a) 4 T. R. 177; *ante*, 73, (b). Cro. Jac. 75; Butler's note to  
 (b) *Vide Horton v. Horton*, Fearne, C. R. Introduction.

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**BY** a rate made for the relief of the poor of the parish of Keynsham in the county of Somerset, the defendants, the company of proprietors of the navigation of the river Avon, from Hannam Mills to the city of Bath, were rated in the aggregate sum of 2*l.* 10*s.* upon an annual value of 100*l.*, for or in respect of a lock, sluice, cut, *and land covered with water, being part of the river Avon in the same parish*, and for profits arising from the same by carriage of merchandize and persons thereon, being a proportionate part of the tolls collected and received in respect of merchandize and persons carried on the river Avon, from and to Hannam Mills to and from the city of Bath. On appeal, the sessions amended the rate by striking out the words "*and land covered with water, being part of the river Avon in this parish*," and by altering "100*l.*" to 5*l.*, and "2*l.* 10*s.*" to 2*s.* 6*d.*, subject to the opinion of this Court upon the following case.

The river Avon was made navigable soon after the passing of the 10 *Ann.* c. 8, entitled "An Act for making the River Avon in the Counties of Somerset and Gloucester navigable from the City of Bath to or near Hannam Mills," and was so made under the authority of that act by the proprietors of the navigation, the predecessors of the appellants (*a*). By the 47 *Geo.* 3, entitled

and lock for the purposes of the navigation, on land purchased by them:—Held, that they were not the occupiers of the river Avon, and not ratable in respect of it as land covered with water; but that they were ratable in respect of the cut and the lock made on their own land.

(*a*) The 10 *Ann.* c. 8, s. 1, enacted, that the mayor, aldermen, and common council of the city of Bath, their successors and assigns, or such person or persons as they should nominate and

appoint, should be and they were thereby authorised, at their proper costs and charges, to make the river Avon (from the city of Bath, down into and within the mill pool or weir pool below Han-

An act of parliament authorised certain persons to make and maintain the river Avon navigable, to scour the river, to make new cuts through lands adjoining, and to build locks, first making satisfaction to the owners of lands. The act then appointed commissioners for settling and apportioning such satisfaction; and then empowered the undertakers to take certain tolls. The undertakers made the river navigable, and scoured and cleansed it from time to time, and made a cut

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“ An Act for enabling the Proprietors of the Navigation of the River Avon, in the Counties of Somerset and

nam Mills and weir, not exceeding 150 yards) navigable for boats, lighters, and other vessels; and from time to time to continue, maintain, and use such navigation in such manner, and also by, through and upon such passages and watercourses into the said river as they should think fit; and for those purposes to clear, scour, open, enlarge, or straighten and restrain the said river from the place aforesaid, or any other streams, brooks, or watercourses, which came or might be brought into the same; and to dig, open, or cut the banks of the river, or any other the streams, brooks, or watercourses aforesaid; and to make any new cuts, trenches, or passages for water, in, upon, and through the lands or grounds adjoining, or near unto the river, streams, brooks, or watercourses, as they should think fit and proper for navigation of boats, &c., or any ways necessary for the more convenient carrying on and effecting the said undertaking, being the soil or ground of her majesty, or of any other person or persons, &c.; and to remove all trees and other obstructions which might hinder the navigation, either in sailing or haling of boats, lighters, &c. upon the river, brooks, &c.; and to build and make over or in the river, streams, &c., or upon the lands adjoining or near the same, or

any of them, such bridges, sluices, or other works as and where they the undertakers and their successors should think fit, and to alter, repair, and amend the same; and to make any ways, passages, &c. for the carrying commodities, goods, and all other things to and from the river, navigable passages, &c., and for carrying all manner of materials for erecting the said works, and for altering the same, and to lay the materials on the ground, near the places where the works should be made or done; and to amend, heighten, or alter any bridges, or to turn or alter any highways in or upon the river, streams, &c., as might hinder the navigation thereon; as also to set out and appoint towing-paths for haling or drawing of boats, &c., passing upon the river, streams, &c., as the said undertakers and their successors should think convenient; and to do all other matters and things which the said undertakers, their assigns and nominees, should think necessary for making and maintaining the river, streams, &c., navigable as aforesaid, or for the improvement or preservation thereof, the said undertakers, their successors or assigns, first giving satisfaction to the owners or proprietors of such lands, tenements, or hereditaments respectively, as should be dug, cut, or

Gloucester, from the City of Bath to or near Hannam Mills, to make and maintain a horse towing-path for the purpose of towing and hawling with horses, or otherwise, boats, lighters, and other vessels up and down the said River;" further powers were given to the said proprietors (a). The river has continued to the time of

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removed, or otherwise made use of for pathways, or for carrying on and effecting the said navigation, or maintaining the same according as was thereafter by that act provided for and appointed.

Sect. 2, appointed certain persons, therein named, commissioners for settling any difference that might arise between the undertakers, &c. and the proprietors of the said lands, &c.; and empowered them to settle and determine what satisfaction every such person should have for such proportion of his lands, &c. as should be cut, dug, removed, or made use of as aforesaid, and for the damage that should be thereby sustained; and to adjust and settle what share and proportion of such *purchase-money* or satisfaction every tenant or other person having a particular estate, term, or interest in any of the premises, should have for his respective interest or right.

Sect. 4 enacted, that in consideration of the charges and expenses the undertakers, &c. would be at, not only in making the river navigable, but also in repairing and keeping up the said works, locks, &c., it should be lawful for them at all times

thereafter to demand, receive, and take for their own proper use and benefit in respect of their charges and expenses aforesaid, for all and every passenger, goods, &c. that should be carried down the said river from the city of Bath to Hannam Mills, the rates and duties thereafter mentioned.

Sect. 12 reserved to the lords, owners, or proprietors of all royalties or liberties of fishing or fowling in the river, their respective rights of fishing or fowling in the same.

Sect. 15 enacted, that in case the undertakers of the navigation should not, when occasion required, sufficiently repair and amend all defects and decays that should happen to the locks erected by virtue of the act, or within four days after notice given to them to do the same, it should be lawful for the proprietors or possessors of the weirs and mills adjoining to such locks to repair the same.

(a) The 47 Geo. 3, after reciting the 10 Ann. c. 8, the appointment of nominees to execute the works, and that such nominees had proceeded to purchase lands, &c., and to make the navigation and works, and to carry on the

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making the rate navigable and navigated, and the proprietors have received the tolls, rates and duties given by the acts, or either of them, from all passengers and goods passing on the river. No part of the towing-path mentioned in the act of the 47 *Geo.* 3, is within the parish of Keynsham. A certain cut was, before the passing of the 47 *Geo.* 3, made in the respondent parish as part of the river, and a certain lock within that parish and in that cut was at the same time constructed at the expense of the proprietors for the purposes of the navigation, and under the provisions of the act of 10 *Ann.*; and both have been and still are used for the same purposes by persons paying tolls, rates and duties to the proprietors. The proprietors have and still do under the powers of the act of 10 *Ann.* from time to time, as need requires, clear, scour and cleanse the bed of the river. The clear annual amount of the tolls, rates and duties, received by virtue of the act of 10 *Ann.* on the navigation, which is eleven miles in length, is 4000*l.* per annum. The length of the river in the respondent parish is three miles; the length of the cut in that parish is 300 yards. No specific toll, rate, or duty, is payable for passing the lock or cut. For the purposes of the tolls, rates and duties, the cut and lock are parts of the navigation of the river. The cut and lock are substituted for the natural river. None of the appellants reside

same under the rules and regulations of the recited act, and that the tolls arising from the navigation, together with the locks and other works belonging to the same, had become vested in the company of proprietors of the Kennett and Avon Canal Navigation, enacted, that it should be lawful for the said company to make towing-paths for drawing

with horses, &c. any boats or other vessels navigating thereon, between Bath and the mill pool and weir, below Hannam Mills and weir, not exceeding 150 yards; to purchase lands for that purpose; and upon payment or tender of the money agreed upon for the purchase of such lands, immediately to enter upon such lands.



within the respondent parish. The question for the opinion of the Court is, whether the appellants are ratable for the whole or any part of the subject-matter of the rate. If the Court shall be of opinion that the whole is ratable, the rate to be confirmed. If they shall be of opinion that the cut and lock only are ratable, the rate to be amended by reducing the annual value to 5*l.*, and the amount of assessment to 2*s.* 6*d.* If they shall be of opinion that the lock only is ratable, the rate to be amended by reducing the annual value to 2*l.* 10*s.*, and the amount of the assessment to 1*s.* 3*d.* If they shall be of opinion that no part is ratable, the rate to be quashed.

This case was first argued at the sittings in banc before the last term, when the Court took time to consider of their judgment. They afterwards directed the case to be re-argued before the whole Court, which was done accordingly in the early part of the present term.

*Jeremy and Moody* in support of the rate. The rate is good to the extent of its whole subject-matter. The company need not be the owners of the banks and bed of the river in order to their being ratable in respect of the profits; it is sufficient if they are the occupiers: and that they clearly are, for the case finds as a fact that they have scoured and cleansed the bed of the river, an act which would in an ordinary case be of itself sufficient evidence, not only of occupation, but even of possessory title. But if that act must be taken to have been done merely in the exercise of the powers vested in the company by the acts of parliament, still enough appears from them to shew, that the company are the owners of the soil of the river. The first section of 10 *Ann.* c. 8, authorises the undertakers and their successors to clear, scour, open, enlarge, or straighten the

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river; to dig, open, or cut the banks; to make new cuts for water through the lands adjoining the river; to remove trees and other obstructions; to make over or in the river, or upon the adjoining lands, bridges, sluices, and other works; and to do all things necessary for making and maintaining the river navigable: first giving satisfaction to the owners of such lands as shall be made use of for the purpose of maintaining the navigation. By the second section, commissioners are appointed for settling differences between the undertakers and the proprietors of such lands, and they are empowered to settle what proportion of the *purchase-money* every person having a particular estate or interest in any of the premises shall have for his respective estate or interest. That is in effect giving the company power to purchase lands, in which respect this act of parliament differs from the 16 & 17 *Car.* 2, c. 12, passed for making the river Itchin navigable; for that act contained no clause giving the undertakers power to purchase lands, nor did it recognise in them any right of soil in the bed or banks of the river; and that was one of the grounds upon which the decision in the case of *Hollis v. Goldfinch* (a) proceeded. It was there held, that the undertakers could not maintain trespass for an injury done to the bank of the river; here the company clearly might maintain trespass for any injury done to the bed or banks of the river: therefore, they must be in the possession, or at least in the occupation, of the river. The fifteenth section of the 10 *Ann.* c. 8, enacts, that in case the undertakers of the navigation shall not sufficiently repair and amend all decays which shall happen to the locks within four days after notice given to them to do the same, it shall be lawful for the proprietors or possessors

(a) 2 D. & R. 316; 1 B. & C. 205.

of the weirs and mills adjoining to such locks to repair the same. The right of entry given in that particular case necessarily implies the exclusion of that right in all other cases, and shews that the legislature considered the company as the owners of the locks. By the 47 Geo. 3, reciting the 10 Ann. c. 8, and the appointment of nominees to execute the works, and that such nominees had proceeded to purchase lands and hereditaments, and to make the navigation and works, and to carry on the same, and that the tolls and locks arising from and belonging to the same had become vested in the company, it is enacted, that it shall be lawful for the company to make towing-paths, and to purchase lands for that purpose, and upon payment or tender of the money agreed upon for the purchase of such lands, immediately to enter upon such lands. The company, therefore, are the owners of the navigation, and the case finds expressly, that they have from time to time cleansed and scoured the bed of the river. That is of itself sufficient evidence of occupation, and gives the company a possessory title; therefore, they are the occupiers of the bed of the river, and might maintain trespass in respect of it. They have an interest in the realty: *Buckeridge v. Ingram* (a). [*Bayley*, J. If that case applies at all, it shews that the soil did not pass.] But it shews that an interest in the soil did pass. In *Rex v. Palmer* (b), and *Rex v. The Earl of Portmore*, (c), it was admitted without argument, that the proprietors of a river navigation were ratable in respect of such interest in the bed of the river. But even if the company have not such an interest in the soil as would enable them to maintain trespass, they are nevertheless ratable in respect

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(a) 2 Ves. jun. 652.

(c) 2 D. &amp; R. 798; 1 B. &amp; C.

(b) 2 D. & R. 793; 1 B. & C. 551.  
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of their profits; they are ratable as the beneficial occupiers of land locally situate within the parish, *Rex v. Cardington* (a), *Rex v. The Aire and Calder Navigation* (b) *Rex v. Macdonald* (c), *Rex v. The Trent and Mersey Navigation* (d), *Rex v. The Birmingham Gas Company* (e), *Rex v. The Brighton Gas Company* (f), *Rex v. Bath* (g), *Rex v. The Rochdale Water-works* (h), *Atkins v. Davis* (i). In *Rex v. Liverpool* (k), and *Rex v. The Trustees of the Weaver Navigation* (l), the parties were held not to be ratable, because the tolls were applicable to public purposes, which was in conformity with a prior decision in *Rex v. Salter's Load Sluice Navigation* (m); and in the *The Duke of Newcastle v. Clarke* (n), it was held, that the commissioners of sewers could not maintain trespass, because they merely exercised an authority on behalf of the public, which vested no property or possessory interest in themselves: those cases, therefore, are none of them authorities to affect the present.

*Campbell, Rogers, and Bere*, contra. The 47 Geo. 3 has no bearing upon the question, because the case finds that no part of the towing-path mentioned in that statute is within the parish of Keynsham; and confining the question to the 10 Anne, c. 8, it is clear that the company are not ratable either for the land covered with water, the locks, or the sluice. First, they are

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| (a) Cowper, 581.             | (h) 1 M. & S. 634.                     |
| (b) 2 Term Rep. 660.         | (i) Cald. 315. And see the             |
| (c) 12 East, 324.            | cases collected in <i>Rex v. The</i>   |
| (d) 2 D. & R. 752; 1 B. & C. | <i>Trent and Mersey Navigation</i> , 2 |
| 545.                         | D. & R. 755, n.                        |
| (e) 2 D. & R. 735; 1 B. & C. | (k) 7 B. & C. 61.                      |
| 506.                         | (l) 7 B. & C. 70, n.                   |
| (f) 8 D. & R. 308; 5 B. & C. | (m) 4 Term Rep. 730.                   |
| 466.                         | (n) 8 Taunt. 602; 2 Moore, 666.        |
| (g) 14 East, 609.            |  |

not ratable for the land covered with water, being part of the river Avon, because they are not occupiers of that land within the meaning of the 43 *Eliz.* c. 2, not being in the actual occupation of the soil of the river. The 10 *Ann.* c. 8, gives the company no interest either in the soil or the water; nor does it give them even the right to use the water in any more ample degree than they originally possessed as part of the public, or than the rest of the public still possess. Their interest most resembles that of trustees of a turnpike-road, though with this difference, that trustees of roads have no interest in the tolls, whereas the tolls are by the fourth section of the act granted to this company, in consideration of their charges and expenses in making the river navigable, and keeping the locks in repair. Toll taken upon a river navigation, and toll taken upon a canal, are essentially different; the one is in the nature of toll thorough: the other is strictly speaking toll traverse. Here the company are authorised to take toll of those who pass over the soil of the river, which belongs to third persons, and along the river itself, which is a public highway; the toll, therefore, is in the nature of a toll thorough, because the owners of it claim no interest in the soil, but take it in consideration of cleansing and keeping open the navigation: a consideration which would be sufficient at common law, *Lord Pelham v. Pickersgill* (a). But toll taken upon a canal requires no consideration (b), for it is "a payment of a sum of money for passing over the private soil of another," as defined

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(a) 1 T. R. 660.

(b) To support a claim of toll traverse, a special consideration need not be shewn, *Richards v. Bennett*, 2 D. & R. 389; 1 B. & C. 223; but a claim of toll thorough cannot be supported

without shewing a beneficial consideration moving to the person of whom it is claimed. *Mayor of Yarmouth v. Eaton*, 3 Burr. 1402; *Hill v. Smith*, 4 Taunt. 520.

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in the case of *Heshord v. Wills* (a); and the proprietors of a canal which they have cut through their own land may demand toll of those that use it, without shewing any consideration to support the demand. In respect of the profits arising from their tolls, therefore, the company are not liable to be rated, because toll thorough is not ratable, though toll traverse is. Then, except the right of taking toll, which is not an interest in the soil, the company have really no interest at all. The act of parliament gives them no interest in the soil; they could not maintain trespass for any injury done to the soil: consequently, they are not ratable as occupiers of the soil. That is the only true criterion of ratability in respect of land. "A party," said *Lawrence, J.* in *Rex v. Watson* (b), "if ratable at all in respect of land, must be rated as occupier; occupation, properly speaking, is possession, and trespass can only be brought by him who is in possession of the land:" and observations of a similar nature were made by *Le Blanc, J.*, in *Rex v. Ellis* (c), and by *Holroyd, J.*, in *Rex v. The Mayor of Sudbury* (d). But it has been said that the company could maintain trespass for an injury done to the soil of the river, and that, consequently, they are ratable as the occupiers. Now, until the passing of the statute of *Anne*, the soil in the river must have been in some other persons as the occupiers, who were, as such, entitled to maintain trespass for any injury done to it. But the statute has made no alteration in this respect; it has not taken away the bed of the river or the mines beneath it from their former owners; it has merely conferred upon the company certain rights to be exercised in the soil of other persons: the former owners, there-

(a) 1 Sid. 454; 1 Mod. 48.

(d) 2 D. & R. 651; 1 B. & C.

(b) 5 East, 487.

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(c) 1 M. & S. 664.

fore, still continue entitled to the soil, subject only to an easement granted to the company, and may still maintain trespass for any injury done to the soil. But that easement may not extend over the whole bed of the river. It is a right of entry for the purposes of maintaining the navigation, as scouring, cleansing, enlarging, or narrowing the course of the river; but there may have been portions of the river which have never required either scouring, cleansing, enlarging, or narrowing; and if so, the company have never had any right of entry upon those parts, and would be liable to an action by the original owners of the soil if they entered there, or upon any other part of the river, unnecessarily, or for any purpose not specified in the act of parliament. Then, if the original owners of the bed of the river can maintain trespass against a wrong-doer, it is quite clear that the company, who have merely an easement therein, cannot; and if so, they are not the occupiers so as to be ratable, for it has been expressly decided that a mere easement in the soil of another is not ratable; *Rex v. Jolliffe* (a). It might as well be said that the owner of a ferry is, as such, the owner of the soil, as that this company are, in respect of their right of entry, the owners of the bed of the river. He has a right to use the water in crossing the river, and if the owner of the soil were to infringe that right by diverting the water, he would be guilty of a tort, and would be liable to an action on the case by the owner of the ferry; but still the owner of the ferry has no interest in the soil of the river, nor have the company in the soil of this navigation. The general rule is, that trespass is only maintainable for injuries to corporeal hereditaments in possession. The only exceptions to that rule are a free warren and a several fishery; and with respect to the latter of those,

(a) 2 T. R. 90.

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it has been much doubted whether it can exist distinct from the property in the soil; *Seymour v. Lord Courtenay* (a); *The Duke of Somerset v. Fogwell* (b). But passing over that doubt, the principle upon which the owners of those franchises may maintain trespass in respect of them is, that they have the exclusive possession, without which no man can maintain trespass. The plaintiff in trespass must have an interest in the *lund*, *Challenor v. Thomas* (c), where it was held that ejectment does not lie for a watercourse, and where the Court said, "The action ought to be for so many acres of land covered with water. But if the land under the river or water does not belong to the plaintiff, but the river only, then, on a disturbance, his remedy is only by action on the case on any diversion of it, and not otherwise." It is the same with respect to the owner of the tolls of

(a) 5 Burr. 2814.

(b) 8 D. & R. 747; 5 B. & C. 875. In the latter case *Bayley*, J. said, "Does a several fishery necessarily imply an ownership of the soil, or may it exist independently of it? Upon that point much legal discussion has taken place; but when I consider the nature of the franchise itself, and the law with respect to fisheries in rivers generally, I have no hesitation in saying that, in my opinion, this\* was not a territorial or corporeal hereditament, but a merely incorporeal franchise." His lordship then quoted a passage from Co. Litt.

4 b, which see, and added, "Now that supposes a grant made by the owner of the soil, capable of granting the soil, and yet shews that a grant of a several fishery, though followed up by livery, which applies only to what is corporeal, would not convey the soil, the livery being made secundum formam chartæ. Then if nothing is granted but a fishery, nothing passes to the grantee but a right to take the fish; he acquires no property either in the water or in the soil." 8 D. & R. 754, 755.

(c) Yelv. 143; Gouldsb. & Brownl. 143.

\* The franchise in that case was a several fishery in a navigable river, where the tide ebbed and flowed,

granted by the Crown to a subject before Magna Charta.



a market; his right is analogous to that of the company in this case; but the lessee of market tolls, not being the owner of the soil, is not ratable to the poor as an occupier of a tenement, *Rex v. Bell* (a). The mere use of land, even though sole and exclusive, does not give the party a right to maintain trespass. Thus trespass will not lie for the disturbance of a right to sit in a pew, *Dawtrie v. Dee* (b); *Stocks v. Booth* (c); nor for the infringement of a right of common, or the disturbance of a private right of way; because it is a damage done to a privilege, liberty, or easement, which one man has in the soil of another, for which he cannot bring trespass, though he may have an action on the case: *Com. Dig. Trespass, D*. But the company here have not the sole and exclusive use of the river, but a limited use only, which, at all events, would not support trespass. Thus commissioners of sewers, having only an authority to be exercised for the benefit of the public, which vests no property or possessory interest in themselves, cannot maintain trespass; *The Duke of Newcastle v. Clarke* (d). Many other instances of a similar kind might be mentioned. The case of *Buckeridge v. Ingram* (e), which has been cited on the other side, is a decisive authority to shew that the company here have no interest in the soil, but a mere easement over it. The powers given to the undertakers in the case of *Hollis v. Goldfinch* (f), cannot be distinguished from those conferred upon the company in this case; yet there

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(a) 5 M. & S. 221. And see *Rex v. Mosley*, 3 D. & R. 385; 2 B. & C. 227.

(b) 2 Roll. Rep. 139; Palmer, 46.

(c) 1 T. R. 428. See all the authorities upon this point col-

lected in *Byerley v. Windus*, 7 D. & R. 564; 5 B. & C. 1.

(d) 8 Taunt. 602; 2 Moore, 606.

(e) 2 Ves. jun. 652.

(f) 2 D. & R. 316; 1 B. & C. 205.

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it was held that the proprietors had no interest in the soil, and could not maintain trespass for an injury done to it. The river Avon, like other navigable rivers, is common to all the King's subjects; it is a public highway; *Vin. Abr. Chemin, A.*; and no individual can have the exclusive ownership or occupation of it. In *Rex v. The Severn and Wye Railway Company (a)*, where a railway was made under the authority of an act of parliament, by which the proprietors were incorporated, and it was provided that the public should have the beneficial enjoyment of the railway; and the company afterwards took up the railway: it was held, that a mandamus might issue to the company to reinstate the railway. In this case the company must be considered as mere trustees for the public, like commissioners of sewers or trustees of a turnpike road, and as such it is quite clear that they have no interest or occupation in respect of which they can be rated to the relief of the poor. The arguments above addressed to the land covered with water, are equally applicable to the cuts and the sluices. The company have only the right of making cuts through the soil of other persons; and that gives them no interest in the soil. It is the same also with respect to the sluices, which cannot be distinguished from sluices made by commissioners of sewers.

The Court took time to consider of their judgment, which was now delivered by

Lord TENTERDEN, C. J.—The rate in dispute in this case was assessed upon locks, a sluice, and land covered with water, and the profits arising therefrom. On appeal, the Court of Quarter Sessions amended the rate by striking out the words "land covered with water." The question in this case was precisely the same as that

(a) 2 B. & A. 646.

in the case of *The King v. The Company of Proprietors of the Mersey and Irwell Navigation*, decided this term (a). In that case we were of opinion that the land covered with water was not in the occupation of the proprietors of the Mersey and Irwell navigation, and therefore that they were not liable to be rated to the relief of the poor in respect of the same. In this case, upon the same ground, we are of opinion that the proprietors of the navigation of the river Avon are not the occupiers of the land covered with water, being part of the river Avon, and are not liable to be rated to the relief of the poor in respect of the same; and, consequently, that the Court of Quarter Sessions did right in amending the rate by striking out of it the words, "land covered with water, being part of the river Avon." We concur with the Court of Quarter Sessions in deciding that the cut or navigable canal, which was actually made by this company upon land purchased by them, and the lock which they have erected on such land, are, according to all the authorities, fit subjects to be rated to the relief of the poor; and this our opinion being conformable with that of the Court of Quarter Sessions, the effect is, that the rule for setting aside the order of that Court must be discharged.

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Order of Sessions affirmed.

(a) *Post*, 106.



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Certain persons, under the authority of an act of parliament, make navigable, clear, cleanse, scour, open, enlarge and straighten, a river, dig and cut banks, erect weirs, locks and dams, make new cuts and trenches through lands adjoining, which they purchase, and make towing paths over land partly purchased and partly rented by them:—Held, that they are not ratable as occupiers of the river or of the land taken for the purposes of the navigation, but that they are ratable for the new cuts and trenches, and for the weirs, locks and dams, erected on their own land.

**THE** churchwardens and overseers of the poor of the township of Barton-upon-Irwell, in the county palatine of Lancaster, by an assessment duly made and allowed, assessed the company of proprietors of the Mersey and Irwell Navigation to the relief of the poor of the said township in the following form :—


Owners' Names.	Occupiers' Names.	Description of Property.	Annual Value.	Rate in the Pound.
The Company of Proprietors of the Mersey and Irwell Navigation.	Ditto.	For land taken and used for the Mersey and Irwell navigation, towing paths, locks and tonnage arising therefrom.	£2908 7s. 6d.	£454 8s. 7½d.

This rate was appealed against at the sessions for the county palatine of Lancaster, held by adjournment at Salford in the said county, on the 13th day of July, 1827, when, on the ground that the amount of tonnage was overvalued, the rate was amended by reducing the above sum of 2908*l.* 7*s.* 6*d.* to 2600*l.*, subject to the opinion of the Court of King's Bench on the following case :—

By an act of parliament, passed in the seventh year of the reign of King George I., entitled, "An Act for making the rivers Mersey and Irwell navigable from Manchester to Liverpool, in the County Palatine of Lancaster," certain persons therein nominated as undertakers, their heirs and assigns, were authorised and empowered, at their proper costs and charges, to make the said rivers Mersey and Irwell navigable, portable and passable, for boats, barges, lighters and other vessels,

from Liverpool to a place called Hunt's Bank, in Manchester, and from time to time to continue, maintain, support and use such navigation by themselves or others, in such manner in, by, through and upon the said rivers, as they the said undertakers, their heirs or assigns, should think fit, and for those purposes to *clear, scour, open and enlarge, or straighten the said rivers Mersey and Irwell, and to dig or cut the banks of the said rivers Mersey and Irwell, and to make any new cuts, trenches or passages for water, in, upon and through the lands and grounds adjoining or near unto the said rivers Mersey and Irwell,* or either of them, as should be necessary and proper for the navigation and passage of boats, barges, lighters or other vessels, and any ways necessary for the more convenient, easy and better carrying on and effecting the said undertaking, *be it the soil or ground* of the king's most excellent majesty, his heirs or successors, or of any other person or persons, bodies politic or corporate whatever; and if necessity required to cut, remove and take away all trees, roots of trees, gravel beds or any other impediments whatsoever which might any ways hinder navigation either in sailing, haling, towing or drawing boats, barges, lighters and other vessels, with men or horses or otherwise upon the said rivers Mersey and Irwell, or upon any new cuts, trenches or passages so from time to time to be made, and to lay the same on any lands thereto adjoining, and to build, erect, set up and make, in, over or on the said rivers or lands adjoining or near to the same, or to the said new cuts, trenches or passages so to be made, or any of them, such and so many bridges, sluices, locks, weirs, pens for water, stakes, dams and other works as should be necessary and convenient, where they, the said undertakers, their heirs or assigns, should think fit, and from time to time when and so often as should be proper and convenient to

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alter, repair, increase, enlarge and amend the same, and to make, have and use necessary ways, passages and other conveniences for the carrying and conveying of any goods, wares, and merchandizes or other things in, upon, to or from the said rivers, passages, trenches or cuts, and for carrying and conveying of any goods, wares, merchandizes or other things, in, upon, to or from the said rivers, passages, trenches or cuts, and for carrying and conveying of all manner of materials for perfecting, completing, and finishing the said works and navigation, and for altering, repairing and amending the same, and to lay and work the said materials on the ground near to the place or places where the said works, or any of them, was, were or should be made, erected or done, and to amend, heighten or alter any bridge, or to turn or alter any highways, in, upon or near unto the said rivers Mersey and Irwell, cuts, trenches or passages aforesaid, and to pull down, alter or demolish any mill, weir or other obstruction in, upon or contiguous to the said rivers, cuts or passages, which might obstruct or hinder the navigation or passage thereon, and to appoint, set out and make towing paths, banks and ways for towing, haling or drawing of boats, barges, lighters and other vessels passing in, through and upon the said rivers, or the cuts, trenches, or passages to be made as aforesaid, or any of them, and from time to time, and at all times thereafter, to do all other matters or things necessary or convenient for making, maintaining, continuing and perfecting the navigable passages of the said rivers Mersey and Irwell as aforesaid, or for the improvement or prosecution thereof, the said undertakers, their heirs or assigns, doing as little damage as might be. *And first giving satisfaction to the respective owners or proprietors of such mills, weirs, lands, tenements or hereditaments as should be pulled down, demolished, altered, dug up, cut,*

*removed, or otherwise made use of, or that in any wise should be prejudiced or damaged by or for carrying on, effecting, preserving, continuing or maintaining the said navigation, and also giving satisfaction for all damage that should be done to the grounds near to the place or places where the said works, or any of them, was, were or should be made, erected or done, by carrying, laying or working any materials thereon, according to the intent and meaning of that act, as was thereafter in and by that act directed and appointed.*

And it was thereby further enacted, that for and in consideration of the great charges and expenses the said undertakers, their heirs or assigns should be at, not only in making the said rivers Mersey and Irwell navigable as aforesaid, but also in making, erecting, repairing, cleansing, maintaining, keeping up and continuing the weirs, works, locks, dams, sluices, bridges and other matters necessary to be made and erected as aforesaid, it should and might be lawful to and for the said undertakers, their heirs and assigns, and no others, from time to time, and at all times thereafter, to ask, demand, receive, recover and take *to and for their own proper use and behoof*, in respect of the charges and expenses aforesaid, for all and every such coal, cannel, stone, timber; and other goods, wares, merchandizes and other commodities whatsoever, as should be carried or conveyed in any boat, barge, lighter or other vessel, in, upon, to or from any part of the said rivers Mersey and Irwell, between Bank Key and the said place called Hunt's Bank in Manchester aforesaid, such rate and duty, rates and duties, for tonnage over and besides what should or might be paid for freight or carriage of the said goods, as the said undertakers, their heirs or assigns, should think fit, not exceeding 3s. 4d. for every ton of such coal, cannel, stone, slate, timber, or other goods, wares, merchandizes

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and commodities, and so proportionably for every quarter, or less quantity or weight, the same rate and duty, rates and duties, to be paid at such place or places near to the said river, and in such manner as the said undertakers, their heirs or assigns, should think fit.


And after reciting that it would be necessary in some places to hale and tow up and draw up the said rivers the said boats, barges, lighters and other vessels, by the strength of men, horses, engines and other means in that behalf convenient, it was therefore thereby further enacted, that it should and might be lawful to and for the said undertakers, their heirs and assigns, their agents and workmen, servants, helpers and assistants, to set up and for them, and the boatmen, bargemen and watermen passing or navigating in or upon the said rivers Mersey and Irwell, or in or upon any cuts, streams or passages that should be made use of as aforesaid, winches and other engines, in convenient places, and by and with the same, by strength of men, horses or beasts, going upon the said banks or lands near to the said rivers, streams, cuts or passages, in convenient manner, without the least hinderance, trouble, or interruption of any person or persons whatsoever, to draw, tow or hale, up or down the said rivers, the said barges, boats or other vessels. And it was thereby further enacted, that the said undertakers, their heirs or assigns, should, (where wanting,) at their own costs and charges, make, set up and from time to time maintain convenient gates and bridges, passages and stiles, in all the hedges and fences in the towing paths and ways to be set out as aforesaid, and over the new cuts, trenches and passages for water so to be made, where necessary for the occupiers of lands, tenements and hereditaments thereunto adjoining to come at their lands for the use and occupation of the same, in such manner as the said commissioners, or any seven or more



of them, should from time to time order and direct, and should not remove any bed of sand, or gravel pits, or other things for preserving of fords, nor in any sort hurt, obstruct or destroy any bridges, highways, common, public or private, usual fords or passages over the said rivers, or either of them, until such time as they should first, at their own costs and charges, have made up and perfected such other conveniences for passing of the same, at or near the same places as should be as convenient to pass over the said rivers, or either of them, as the said commissioners, or any seven or more of them should adjudge proper, notice being first given to all the acting commissioners of the time and place of the meeting to adjudge and determine of such conveniences to be made as aforesaid, at least twenty days before such meeting, and all such conveniences so to be made should from time to time be maintained in good and sufficient repair by the said undertakers, their heirs or assigns.

And it was thereby further enacted, that if the said undertakers, their heirs or assigns, should, in pursuance of the powers given by the said act, raise the water in the said rivers Mersey and Irwell above its ancient or usual height, whereby the adjacent lands might be more liable to be overflowed or damaged than they had formerly been, that then they, the said undertakers, their heirs or assigns, should, at their own proper costs and charges, from time to time cause the banks of the said rivers, and of all such streams, trenches or brooks as come into the said rivers, or either of them, to be proportionably raised, heightened and strengthened in all parts where need should require, so as the new banks should be able and sufficient to contain the water at such its raised height, and also should, from time to time, maintain and repair the said banks as often as occasion should require; and if the said undertakers, their heirs or assigns, in pursu-

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ance of the powers aforesaid, should make any new cuts, trenches or passages for water, by reason whereof, or by means of the navigation to be made and effected as aforesaid, any person or persons should not have convenient ingress or egress into or out of his, her or their respective lands, tenements or other hereditaments, or any part thereof, as he, she or they before that time had, or as occasion should require, that then and in such case the said undertakers, their heirs and assigns should, at their own proper costs and charges, make, erect, and from time to time maintain, such sufficient bridge or bridges, or other sufficient passages over and near unto every such new cut, passage or trench, as by the said commissioners, or any seven or more of them, should be directed. And it was thereby further enacted, that the said rivers Mersey and Irwell were, and for ever thereafter should be, esteemed and taken to be navigable from Liverpool aforesaid to the said place called Hunt's Bank in Manchester aforesaid, and that all the king's liege people whatsoever, with their goods and merchandizes, might have and lawfully enjoy their free passage in, along, through and upon the said rivers Mersey and Irwell, or any part thereof between Liverpool aforesaid and the said place called Hunt's Bank, in Manchester aforesaid; with boats, barges, lighters and other vessels, and also all necessary and convenient liberties for navigating the same without any let, hinderance or obstruction from any person or persons whatsoever, paying such rate and duty, rates and duties, as were by that act appointed to be paid to the said undertakers, their heirs or assigns. And after reciting that the said river Mersey had been theretofore and then was navigable from Liverpool to Bank Key, it was further enacted that all goods and merchandizes (as theretofore the same had been) should be and remain free and exempted from paying any

toll, duty or tonnage to the said undertakers, their heirs or assigns, between Liverpool and Bank Key aforesaid.

By another act of parliament, passed in the 4th year of the reign of King *Geo.* 3, entitled "An Act for altering an Act passed in the 7th year of the reign of his late Majesty King *Geo.* 1, entitled An Act for making the rivers Mersey and Irwell navigable from Liverpool to Manchester, in the county palatine of Lancaster, by incorporating the proprietors of the said navigation and to declare their respective shares therein to be personal estate," the then proprietors and undertakers were incorporated by the name of "The Company of Proprietors of the Mersey and Irwell Navigation," and invested with the same powers as were given by the former act.

The said appellants, and the undertakers from whom they derive their title, have at very heavy costs and charges, and in pursuance of the powers granted to them by the said act, made and maintained and still do maintain and continue navigable the said rivers from Liverpool to Manchester. They have made (and kept in order, by repairing with gravel and sand) towing-paths by the side of the whole line of navigation, by cutting away the brows, levelling the lands, and erecting bridges over brooks and ditches crossing the towing-paths. They pay rent for the towing-paths along some parts of the line; wherever they have not bought land they pay rent for the towing-paths. The towing-paths are not fenced off from the adjoining lands except in a few places, and in these instances the fences have been made and maintained by the owners of the adjoining land and not by the appellants, but gates have been erected by the company at the fence between adjoining fields where the landholders have required it to prevent the cattle trespassing, and such gates are maintained by the appellants. The banks between the river and the towing-

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path have been repaired sometimes by the appellants, but chiefly by the landowners, who have in that case been supplied by the appellants with stone and materials at a low price, to induce them to make such repairs. When the navigation is impeded, the appellants scour and dredge the river, applying the gravel and sand so taken out to the repairs of the towing-paths, and selling the surplus when they have more gravel or sand than is necessary for that purpose. In several parts of the navigation the appellants have made new navigable cuts, connecting different parts of the river. Three such cuts, of the breadth of eight yards each, and being altogether 938 yards in length, have been made and now are used by the appellants in the township of Barton-upon-Irwell. The land necessary for these cuts belongs to the appellants and was taken by them under the powers of the act, and compensation made to the landowners pursuant thereto. The length of the navigation within the township of Barton-upon-Irwell is 9 miles 7 furlongs. Six miles and a half of the towing-path is within the township of Barton-upon-Irwell, and the residue thereof is in another township.

There are several weirs and locks on the navigation erected and maintained by the appellants within the township of Barton-upon-Irwell, and the surplus water held up by one of their weirs is taken from the appellants by the proprietors of a neighbouring mill, who pay an annual rent to the appellants for it. A very large traffic is carried on along the navigation in flats and other vessels, belonging in part to the appellants, and the residue to other persons, who employ them in the carriage of goods between Manchester and Liverpool. The tonnage actually received by the appellants from the other persons, together with the tonnage which would be received by them if the vessels so employed by them-

selves were the property of other persons, amounts to a large sum, and the proportion thereof payable in respect of the length of the navigation and towing-paths in the township of Barton-upon-Irwell, amounts to the sum of 2600*l*. The appellants contended that they were not ratable at all for or in respect of the property rated, or if ratable at all, that they were only ratable for and in respect of the cuts, and not in respect of the rest of the navigation and towing-paths, and that in such case they ought only to be rated in the proportionate part of the said sum of 2600*l*., which should be considered payable in respect of the length of the said cuts; and further, that they were not ratable for tonnage upon their own vessels, which paid no such duty. But the Court of Quarter Sessions held that the appellants were liable to be rated for the whole line of navigation within the township of Barton-upon-Irwell in respect of the land taken and used by them for the Mersey and Irwell Navigation, the towing-paths, weirs, locks, cuts and sluices, but assessed the annual value of the profits at 2600*l*., and ordered the sum to be reduced accordingly. It is agreed that the several acts of parliament for making and regulating the said navigation shall be taken as part of this case, and may be referred to as such.

*Courtney, Starkie and Armstrong*, in support of the order of sessions. The appellants are rated in respect of four things, viz. lands taken and used, towing-paths, weirs, locks and sluices, and the new cuts. As to the new cuts, the appellants stand in the same situation as any other canal company. The case finds that the land taken for the cuts belongs to them. They are ratable in respect of the weirs, locks, and sluices, *Rex v. Macdonald* (a), *Rex v. Cardington* (b). So for the towing-

(a) 12 East, 324.

(b) Cowper, 581.

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paths, *Rex v. The Mayor of London* (a). They are liable for land taken and used for navigation. The case finds that the appellants have made and maintained, and continue navigable, the said rivers from Liverpool to Manchester. They scour the river and sell the gravel. They have exclusive possession, with slight exceptions in favour of pleasure boats and boats with manure. The appellants cut away mounds. They bought land for some towing-paths. The act of parliament makes this a public navigable river, and the appellants will probably avail themselves of this circumstance to contend that this is like a highway. They will perhaps insist that this was not a beneficial occupation, and will rely upon the clause in the act which makes the navigation a highway. The reason why trustees of turnpike roads are not rated is, that they are not beneficial occupiers; it being provided by the general turnpike act that they shall not directly or indirectly derive any benefit. By the express provision of the turnpike act "the trustees are to lay into roads the land which they are directed to purchase" (b). This is very different from the language of these acts; in the first of which the words are, "to and for their own proper use and behoof." The second act states that the trustees had done what they were to do. It was a condition precedent that they should make compensation. They must therefore have bought the land which constituted the bed of the river. If it be argued that they stand in the same situation as trustees, it is sufficient to refer to this act. [Sir J. Scarlett. It is not meant to be contended that the occupation was not beneficial. The ground taken by the appellants is, that they were not occupiers.] In *Rex v. Mayor of London* (c) it was said that the possession follows the property. It cannot be

(a) 4 T. R. 21.

(c) 4 T. R. 21.

(b) 3 Geo. 4, c. 126, s. 86.

doubted that the appellants were in the actual occupation, inasmuch as they took the tolls. *Rex v. Jolliffe* (a), though relied upon by the other side, is in truth an authority in favour of the respondents. The appellants are in the same situation as Sir *John Eden* was there. In *Rex v. Bell* (b) the exclusive use of a waggon way was held to be ratable. The case of *Rex v. The Weaver Navigation* (c) was cited at the sessions on account of a dictum of Mr. Justice *Bayley*, but there must be a mistake in the report of that case. The Court can only look to the occupation. If that case is accurately reported, it must be contended on the part of the respondents, that the soil was vested in them by 4 Geo. 3. [Lord *Tenterden*, C.J. Could it be contended that the company were not ratable for the towing paths?] The case finds that such land as they did not buy they pay rent for. [Bayley, J. If they have only an easement, the party who has the possession of the soil is alone ratable. Lord *Tenterden*, C.J. The question then is, whether the company are the occupiers of the river.] They are also ratable for the navigation. The first statute that speaks of purchase money, 4 Geo. 3, enacts that the powers given by 7 Geo. 1, c. 15, shall be vested in the company of proprietors of the Mersey and Irwell Navigation, and enables them to purchase lands, &c. It is clear that the company had the power of purchasing. In *Hollis v. Goldfinch* (d) the undertakers of the navigation had no power to purchase lands, nor did the act recognise in them any right of soil in the beds or banks of the rivers intended to be made navigable, and for these reasons the Court held in that case that there was no ground for presuming a purchase, and that therefore trespass quare

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(a) 2 T. R. 90.

(b) 7 T. R. 598.

(c) 7 B. &amp; C. 70.

(d) 2 D. & R. 316; 1 B. & C.  
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clausum fregit was not maintainable. So in the *Duke of Newcastle v. Clarke* (a), the Court of Common Pleas held that commissioners of sewers had merely an authority, and not such a possessory interest as would entitle them to maintain trespass. But in *Dyson v. Collick* (b), the contractors for the completion of a navigable canal were held to have such a possession as would entitle them to maintain trespass. The statute of *Elizabeth* speaks of occupation. Occupation must be understood with reference to the subject-matter. Here it must mean the persons who have the substantial, beneficial and apparent occupation. To whom could the overseers look as occupiers? The appellants are the persons deriving profit from the navigation, and they are the persons who use the land so as to make it productive. The gas pipes at Rochdale, Bath, Brighton (c), and Birmingham, are all rated. The case of *Rex v. Jolliffe* (d), when examined, is in favour of the appellants. In that case, the defendant had enjoyed the exclusive right of using a way-leave over land which he held in common with Mr. *Milbanke*, paying a certain sum yearly, and the privilege of using a way-leave which had been demised to Sir *John Eden*. Mr. Justice *Ashurst* observes, "that it cannot be said that the defendant was an occupier of any thing, for all that he has is a concurrent right given him by Sir *John Eden* of making use of this way-leave at so much per ton for all the coals that he should carry, which is nothing more than a purchase of the liberty of carrying every ton of coals." Mr. Justice *Grose* says, "in order to support this rate the defendant must be rated either for the way or the land over which the way passes; but he cannot be rated for the latter,

(a) 8 Taunt. 602.

(b) 5 B. & A. 600; 1 D. & R. 225.

(c) *Rex v. Brighton Gas Light*

and *Coke Company*, 8 D. & R.

308; 5 B. & C. 466.

(d) 2 T. R. 90.



because the land must have been before rated in the hands of the occupier of that land. Neither is he liable to be rated for the former, because it is positively stated that he never made the waggon ways, which he had the power of doing under the leases, but by the consent of Sir *John Eden* he has used those way-leaves which Sir *John Eden* had made, and if any person could be rated for those way-leaves it would be Sir *John Eden*." Yet Sir *John Eden* clearly had not the soil. His lordship's only doubt therefore was whether a profit was made of the use of the soil. In *Rex v. Bell (a)*, the defendants, who were grantees of way-leaves, had inclosed them, thereby excluding all other persons, which does not make a very material difference. If the Court are of opinion that the soil of the river is not vested in the company, yet if the whole is contributory to a gross profit, the whole is ratable. The rate must be entire. It is next to impossible to make an assessment apportioning the rate upon the different sources of profit. The cases shew that where land is contributory to a gross profit the whole must be rated. It seems to have been considered at first that tolls were ratable. When it was found that the occupation of land was necessary, the cases shew the nature of the occupation. In *Rex v. Nicholson (b)*, the Court held that tolls must be connected with something real, and they seem to have considered that making them payable at their own wharfs and warehouses was sufficient. In *Rex v. Macdonald (c)*, the Duke of *Bridgewater's* trustees were held to be ratable as occupiers of a canal lock, tunnel dues or rates. In *Rex v. Ellis (d)*, the lessee of the fishery was held

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(a) 7 T. R. 598.

(b) 12 East, 330.

(c) 12 East, 324; and see *Rex*v. *Coke*, 8 D. & R. 666; 5 B. & C. 797.

(d) 1 M. &amp; S. 652.

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to be ratable, and in *Rex v. Hogg* (a), a house and engine for carding cotton, because held at an entire rent, were held to be ratable. So here the appellants are ratable for the whole, it being one entire property. *Rex v. Bradford* (b). [Lord Tenterden, C.J. There the Court held that it was one office.] But *Hollis v. Goldfinch* (c) does not shew that trespass could not be maintained. Here they drag the river, make the walls, and sell the water.

Sir J. Scarlett, J. Williams, Coltman and Aglionby, contra. The towing-paths perhaps present a difficulty, but the appellants object to the generality of the rate, which uses the word "tonnage" and "land taken and used," *Rex v. Rebowe* (d); *Rex v. Cardington* (e). It is impossible to state the law more clearly than is done by Lord Ellenborough in *Rex v. Nicholson* (f). Tolls are not, as tolls, ratable at all. Tolls in their nature are not capable of occupation. A man may have dominion over water appropriated for domestic or manufacturing purposes, and may maintain an action for a disturbance, but he can have no *occupation* of running water. A flowing river, the soil of which is not vested in the company, is not capable of such occupation by them as to render the company ratable, notwithstanding they have the tolls to their own use. In *Rex v. Palmer* (g), Lord Tenterden, in giving the judgment of the Court, says, that it is now fully established that tolls *per se* are not ratable. The proprietors of a navigation are therefore ratable only as

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| (a) 1 T. R. 721; Cald. 266.  | (e) Cowp. 581; 1 Bott, 5th   |
| (b) 4 M. & S. 317.           | ed. 154, pl. 183.            |
| (c) 3 D. & R. 216; 1 B. & C. | (f) 12 East, 330.            |
| 905.                         | (g) 2 D. & R. 793; 1 B. & C. |
| (d) 1 Const, 142, pl. 177;   | 546.                         |
| Cowp. 583; 1 Nol. 90.        |                              |

the occupiers of the canal, or land covered with water, for their tolls, as profits arising out of that land so used, *Rex v. Trustees of the River Weaver* (a). It would be difficult to shew that the soil of the river Mersey was vested in the company; the soil is, in fact, vested in the Duke of Lancaster: and the soil of Irwell is vested in the owners of the adjoining lands. The acts done by the company, which are found in the case, are *prima facie* evidence of occupation; but when explained they amount to nothing. So where a builder is engaged in building a house, his acts would, unexplained, be evidence of a *seisin in fee*; and it would be the same with a person who was employed to build the custom-house (b). Here the act only gives the company a right of possessing easements over the soil. No words in the act enable them to purchase the soil of the river, though there are words enabling them to purchase other lands. If this company is ratable in respect of the use of water running over land in the parish, some future age may rate balloons passing the air over the parish, on the ground that *cujus est solum ejus est usque ad cælum*. 'This is a most ungrateful rate, inasmuch as not a country gentleman perhaps would attend the sessions the value of whose estate was not doubled by this navigation. Where turnpike roads are made, there is no occupation by the trustees, who merely receive compensation for the passage which they afford. The case finds that part of the rate is imposed in respect of boats belonging to the company, *Rex v. Leeds and Liverpool Canal Company* (c).

(a) 7 B. & C. 70, n.

(b) In *Hiern v. Hiern*, 13 Ves. 122, Lord Eldon, C., is represented to have said, "that possession was not even *prima facie* evidence of property in land."

This is probably the mistake of the reporter; but the supposed dictum, being placed in the margin, has found its way into the indexes, &c.

(c) 6 T. R. 53.

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Upon the face of the case they have made an assessment for the amount of tonnage, upon a supposition that their own boats have belonged to other persons and paid tonnage. [Lord *Tenterden*, C. J. If the company occupy any one ratable property the Court should not quash the rate, but send it back to the sessions to be amended.] The Court must quash the rate, *Rex v. Dursley (a)*, *Rex v. Hogg (b)*, *Rex v. St. Nicholas, Gloucester (c)*, *Rex v. Corporation of Bath (d)*. The rate has never been paid. There can be no inconvenience therefore from quashing it.

Lord *TENTERDEN*, C. J.—I am of opinion that the company are not ratable for the navigation of the ancient river. The rate being made upon them as proprietors of the navigation, the order must be quashed. Of the new cuts the company are the actual purchasers, so of the locks. I say nothing about the towing-paths, because it is suggested that the facts are incorrectly stated. We ought to quash the order of sessions, and send back the case to the sessions for them to rate—if they can.

BAYLEY, J.—At first it struck me that the company were liable to be rated for the whole. As to the navigation I think I was wrong. To bring them within the statute of *Elizabeth*, they must be *occupiers*. Being entitled to have banks to hold the water, I thought they were *occupiers*. But they can maintain no description of action which *occupiers* can (e). They have merely an easement. Here the soil of the ancient bed of the river does not belong to the company. They have only a qualified right. The soil remains in the original owners, and in their occupation. Where they make cuts under

(a) 1 T. R. 721; Caldec. 266.

(d) 5 East, 325.

(b) Caldec. 262.

(e) And see *Buzzard v. Capel*,

(c) 14 East, 609.

8 B. &amp; C. 141; 2 M. &amp; R. 197.

the power given them, and erect weirs, dams or locks, they are occupiers of the land where these stand. Upon the point whether the rate should be quashed or sent back for amendment, I think it ought to go down to the sessions to be amended by rating only such parts as are legally ratable, as otherwise you will reimburse for by-gone time by a rate upon those who are occupiers at the time of the second rate.

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LITLEDALE, J.—I am entirely of the same opinion. I think the navigation is not ratable. I rather think the rate should go back to the sessions. But for the circumstance mentioned I should have thought the rate should be quashed. I do not see how it is possible to say how much should be assessed for the towing-paths. In respect of the cuts, the amount may perhaps be ascertained; but with respect to the locks, one cannot say how much of the 2600*l.* should be put upon that part of the property; but that is for the justices.

PARKE, J.—This case has been argued with great ability. At last it resolves itself into this. Were the company the occupiers of the land? The older cases seem to have been decided upon a wish to extend the funds, and by looking into cases, instead of attending to the words of the act of parliament. In *Williams v. Jones* (a), the owner of a ferry was held not to be ratable for the tolls in the parish where they were collected, and where one of the *termini* of the ferry was situated, and on which the ferry boat was secured by means of a post in the ground (b). I think the company are not ratable for the bed of the river, but that they are ratable for the locks, the weirs, and the cuts. I do not see how this is

(a) 12 East, 346.

(b) See *Peter v. Kendall*, 6 B. & C. 703.

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distinguishable from the case of a ferry. They are not occupiers of the highway. They have merely a special power in it. There may be a difficulty in fixing the quantum of rate. That, however, is not for us but for the sessions.

Order of Sessions quashed, the case to be remitted to the sessions to consider of amending the rate, to rehear and reconsider the same.

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Where an order of removal is served so late that an appeal cannot be tried at the next sessions, it is not necessary that an appeal should be entered at those sessions.

ON the 8th of April, 1828, an order of removal from Upottery, Devon, to Pitminster, Somerset, was served on the overseers of the latter parish. By the practice of the Court of Quarter Sessions for Devon, an appeal may be entered and respited without notice, but it cannot be tried without giving notice, eight days clear before the sessions. No appeal was entered at the Easter Sessions, which were held at the Castle of Exeter, about 30 miles from Pitminster; but at the July Sessions the regular notice to try the appeal had been served. The Court of Quarter Sessions, being of opinion that it ought to have been entered at the Easter Sessions, refused to hear the appeal. In Michaelmas Term last, *Coleridge* upon the authority of the case of *The King v. The Justices of Southampton (a)*, obtained a rule nisi for a mandamus to the justices to enter a continuance and hear the appeal.

*Crowder* and *Praed* now shewed cause. An appeal against an order of removal must be made to the next possible sessions. *The King v. The Justices of the East*

(a) 6 M. & S. 394. For the facts of this case *vide post*, 126.

*Riding of Yorkshire* (a). If the party aggrieved by the order cannot give notice for the full number of days, he must enter and respite. *The King v. The Justices of Gloucestershire* (b); *The King v. The Justices of Herefordshire* (c). In *The King v. The Justices of the West Riding of Yorkshire* (d), where six days only intervened between the service of the order and the sessions, *Le Blanc, J.*, said, "We do not think that the parish were entitled strictly to pass over the first sessions." [Lord *Tenterden, C. J.* What is the advantage of such a proceeding?] It affords the parties an opportunity of compromising in the interval between the two sessions. [Lord *Tenterden, C. J.* They are not bound to give notice until just before the sessions at which they try.]

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*Coleridge and Escott*, in support of the rule. In *The King v. The Justices of Essex* (e), this Court granted the application which is now made, on the ground that it would be idle to enter an appeal where the order of removal had been served too late to entitle the parties to try their appeal at the next sessions. Lord *Ellenborough* says, "The statute 13 & 14 *Car. 2*, certainly directs the appeal to be at the next quarter sessions, but that must mean at the next practicable sessions. The parish officers must have a reasonable time allowed them to make the necessary inquiries, that they may judge of the propriety of appealing or not. The notice here is served on the Saturday. I am of opinion that they are not bound to devote Sunday to such a purpose. They have then only one entire day, *i. e.* the Monday, to get the necessary information, and to consider whether they will appeal or not, and that, in my judgment, is not suffi-

(a) Dougl. 193.

(d) 4 M. &amp; S. 327.

(b) Ibid. 191.

(e) 1 B. &amp; A. 210.

(c) 3 T. R. 504.

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cient. It has been said, that although the appeal could not have been heard at those sessions, still it ought to have been entered and respited; but that would only be incurring a useless expense, without conferring any benefit on either party, and was therefore quite unnecessary." In *The King v. The Justices of the West Riding of Yorkshire* (a), the appellants not only passed over the first sessions, but merely entered and respited at the second sessions; and *Le Blanc, J.* said, that if they had done at the second as much as they ought to have done, the Court would have relieved them. In *The King v. The Justices of Southampton* (b), the order of removal was made on the 2d of January, but not served till the 7th, and the Epiphany Sessions were held on the 14th. No appeal was entered at those sessions, and being entered at the Easter Sessions, after eight days' notice, as required by the practice of the Court, as well as in Devonshire, it was dismissed by the Court, who conceived that the appeal ought to have been entered and respited at the former sessions. There the Court made the rule for the mandamus absolute.

*Cur. adv. vult.*

LORD TENTERDEN, C.J. after stating the facts of the case.—The appellant parish could not have tried their appeal at the Easter Sessions. It has, however, been contended that it should then have been entered and respited. To enter, for the mere purpose of adjourning, would merely occasion unnecessary expense. The only inconvenience which can result from our holding that it is not necessary to enter an appeal at the first sessions, where it cannot be tried at those sessions, is, that the removing parish may be kept in ignorance of the intention to appeal until eight days before the second ses-

(a) 4 M. & S. 327.

(b) 6 M. & S. 394.



sions. But this inconvenience, if it shall be found to arise, may be met by the Court of Quarter Sessions requiring, that, under such circumstances, a longer notice shall be given.

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Rule absolute (a).

(a) And see *The King v. The Justices of Wilts*, 2 Bott, 4th ed. 717, 5th edit. 725; *The King v. The Justices of Flintshire*, 7 T. R. 200; *The King v. The Justices of Dorset*, 15 East, 200; *The King*

*v. The Justices of Kent*, (in *Lenham v. Pluckley*,) 3 M. & R. 410, 8 B. & C. 639; *The King v. The Justices of Kent*, (in the matter of *Ritchie*,) 9 B. & C. 283.

PELLEW v. The Hundred of EAST WONFORD.

CASE, on 9 Geo. 1, c. 22, for damage by fire to certain barns and outhouses, being at the time of the fire in the occupation of *John Otton*, the reversion thereof, after a certain term of years, belonging to the plaintiff. At the trial before *Park, J.* at the Exeter spring assizes, 1827, (b) the plaintiff was nonsuited, subject to the opinion of this Court on the following case :

The plaintiff, before and at the time of the fires herein-after mentioned, was and still is the proprietor of an estate called Canonteign, in the parish of Christow, and within the hundred of Wonford and county of Devon. Upon this estate stood a large house, formerly a mansion, but for many years past used as a farm-house; and this house, with an extensive range of barns and other outhouses belong-

A tennor, and also the party seized of the freehold subject to the term, may each recover damages to the extent of 200*l.* against the hundred for the injury resulting from a felonious burning in respect of their possessionary and reversionary interests.

Where the reversioner sues, no servant of his

having had the care of the premises, he is the proper person to give in an examination.

The examinant is not bound to state mere suspicions entertained by him as to the person who committed the offence, unless interrogated thereto by the magistrate.

The two days allowed by 9 Geo. 1, c. 22, for giving notice of the offence, are exclusive of the day on which the fire happens.

(b) Counsel for the plaintiff, defendant, *Wilde*, Serjeant, and *Coleridge* and *Praed*; for the *Carter*.

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ing thereto, formed the barton (a) of Canonteign. The house, barns, and outhouses, except one stable, and another of the outhouses used as a dog-kennel, long before and at the time of the fire were in the possession of *John Otton*, as tenant to the plaintiff; *Otton*, with his wife and family, residing in the house, and occupying the greater part of it. The other part of the house was occupied by *John Pennington*, the plaintiff's game-keeper, who had lived there some years with his wife and family; *Pennington* also used the stable and dog-kennel, but had nothing to do with the other outhouses. The plaintiff himself resided at Stoke-lake, in the parish of Hennock, about four miles from Canonteign. On the morning of Saturday, July 9, 1825, the plaintiff, with some other gentlemen, his friends, went from Stoke-lake to Canonteign barton, and taking *Pennington* with them were afterwards engaged in shooting rabbits in a part of the estate distant about a quarter of a mile from the barton, on the top of a high hill, which commanded a view of the mansion and of all the outbuildings. While they were so engaged, at about two o'clock, *p.m.* fires were observed to break out in several parts of the premises; first in one of the barns, and then in another barn distant 300 yards from the first; afterwards in the dog-kennel, which was separated from the last-mentioned barn, and then in other of the outbuildings. The fires were immediately seen by the plaintiff, and he, as well as the persons with him, hastened to the spot, and were actively employed for a considerable time in endeavouring to extinguish the flames. The barns and outhouses were, however, burnt down. The plaintiff did not leave the place till about five o'clock, *p.m.* when it was supposed the fire had been subdued; but it broke

(a) In the West of England      stand. *Vide Spelman, verbo Ber-*  
this word signifies a farm home-      toua.

out again in some of the ruins, and was burning a little between one and two o'clock in the following morning. On the day of the fire, and long before, *Otton*, his wife and family, and *Pennington* and his wife and family, were living upon the premises as aforesaid, and *Otton* had in his employ upon the premises several farming servants. *Otton* and several other persons known to the plaintiff were present in the barton, amongst the buildings, when the fire broke out, and when the plaintiff, his friends and *Pennington*, came there from the hill; and one of those persons, not a servant of *Otton's*, shortly afterwards discovered a ball of flax on fire under some straw in one of the outbuildings not then in flames, of which fact the plaintiff was then informed. The damage done to the barns and other outhouses in the possession of *Otton* greatly exceeded 200*l.*, and the fire was wilful and malicious. The plaintiff, on the evening of the same day, after his return home, mentioned to one of his friends the name of a person whom he suspected to be the author of the fire, and he retained the same suspicion long after the time of his examination hereinafter mentioned. On Monday, July 11, notice of the offence was given by the plaintiff to four inhabitants of the village of Christow, that being the nearest village to Canonteign, and in the same parish. On the 14th of the same month the plaintiff gave in his examination upon oath to a magistrate of the county, being the magistrate resident nearest to Canonteign, at the distance of about a mile and a half from that place. The examination stated, that "on Saturday last, the 9th day of this instant July, the barns and outhouses, part of the barton of Canonteign, situate in the parish of Christow, in the hundred of Wonford and said county of Devon, and now in the possession of *John Otton*, and the property of him the said *Pownall Bastard Pellew*,

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were unlawfully, wilfully, maliciously, and feloniously set on fire; and this deponent further saith, that he *does not know* the person or persons who committed the said offence, or any of them.

*Posnall Bastard Pellew."*

No other person was examined.

At the following Christmas *Otton* gave up his interest in the estate, and the plaintiff took possession of it. The repairs which have been done to the buildings injured or destroyed by the fires, have been done under the plaintiff's orders, and at his expense. The offenders have not been apprehended and convicted of the above-mentioned offence, nor any one of them (*a*). This action was commenced against the hundred within one year next after the offence had been committed.

*Praed*, for the plaintiff. Four objections were raised to the plaintiff's right to recover in this action. First, it was insisted that the plaintiff was incapable of suing, being merely a reversioner; but it is submitted that the plaintiff is within the words of the act, which are very large, and extend to every person sustaining damage (*b*). The plaintiff has sustained damage. The repairs were done at his expense, and he has paid the amount. This act is remedial, and is to receive a liberal construction; though it was contended at the trial, that as against the hundred the proceeding is to be considered as penal. The same act may be both penal and remedial. *Bones v. Booth* (*c*), *Ratcliffe v. Eden* (*d*), *Hyde v. Cogan* (*e*). In

(*a*) *Otton* was tried for arson on the prosecution of Captain *Pellow*, and was acquitted.

(*b*) By 9 *Geo.* 1, c. 22, s. 7, the remedy is given "to all and every the person and persons for the damages they shall have sustained

or suffered." The corresponding words in 7 & 8 *Geo.* 4, c. 81, s. 2, are, "to the person or persons damaged by the offence."

(*c*) 2 *W. Bla.* 1226.

(*d*) *Cowp.* 485.

(*e*) *Dougl.* 699.


the Riot Act (a) the words are not so strong. [Lord *Tenterden*, C. J. You need not labour that point. It is penal as far as respects the offender, but remedial as against the hundred.] *Wilmot v. Horton* (b), Serjt. *Williams's* note to *Pomfret v. Ricroft* (c). The hundred cannot set up a contract between the plaintiff and his lessee. [Lord *Tenterden*, C. J. It does not appear that there was any contract. *Bayley*, J. I believe there are many cases in which the reversioner has sued.] The question came before the Court in *The Duke of Somerset v. Hundred of Mere* (d), but the decision proceeded upon a different point. In *Jefferson v. Jefferson* (e), it was said to be unreasonable to compel the party to wait until the reversionary interest became vested in possession. It would be equally unreasonable here. The plaintiff sustained immediate damage; for if he had wished to sell he could not have obtained so large a price. That is a sufficient cause of action. *Jesser v. Gifford* (f).

The defendant's second objection was, that the two days for giving the notice are both inclusive, and that the notice not having been given till the Monday was too late. This objection is founded upon a note of Mr. Serjt. *Williams* to *Pinkney v. Inhabitants de Roteland* (g), where, upon 27 *Eliz.* c. 18, s. 9, which requires the action against the hundred for a robbery under the statute of Hue and Cry, (13 *Edw.* 1, stat. 2, c. 1 & 2,) to be brought *within one year after such robbery*, it is stated to have been adjudged in *Norris v. Hundred of Gawtry* (h), that the day when the robbery was committed is to be included in the year; as if a robbery be committed on

(a) 1 *Geo.* 1, stat. 2, c. 5.

(b) Dougl. 702, n. (3).

(c) 1 *Wms. Saund.* 321.(d) 4 *B. & C.* 167; 6 *D. & R.*(e) 3 *Levinz*, 130.(f) 4 *Burr.* 2141.(g) 2 *Wms. Saund.* 375, n. (3).(h) *Hob.* 139.

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the 9th of October, the action must, at the latest, be brought on the 8th October following. But in *Nesham v. Armstrong* (a) notice was given on the 22d of March, where the fire was on the 20th. That case arose upon this very statute of 9 Geo. 1, and no objection was taken by *Richardson*, who argued for the defendant, that the notice was not in time. He appears not to have thought the point arguable. The statute of uses (b) requires indentures of bargain and sale to be inrolled within six months; upon which Lord Coke says (c), "so as the date itself is taken exclusive." The 17 Geo. 3, c. 26, requiring memorials of annuities to be inrolled within 20 days (d), has been construed to exclude the day of execution. *Fallon, ex parte* (e). In *Lester v. Garland*, (f) the cases were reviewed by Grant, M. R., and the conclusion at which he arrived was this, that the day of the act done is to be excluded, unless the party to be affected by the computation be party or privy to such act. Here the effect of treating Saturday as one of the two days would be to throw back the act done to the Friday. *Duncan v. Carlton* (g). [Bayley, J. It has been held, upon the statute of William (h), that the five days are to be considered as five times 24 hours.]

The third objection was, that the plaintiff was not the proper person to give in an examination; and for this two cases are relied on, *Nesham v. Armstrong* (i), and *The Duke of Somerset v. Hundred of Mere* (k). In the former case the objection was, that the partner was

(a) Holt, N. P. C. 466, 1 B. & A. 146.

(b) 27 Hen. 8, c. 16.

(c) 2 Inst. 674.

(d) 17 Geo. 3, c. 26, s. 3; now 30 days by 53 Geo. 3, c. 141.

(e) 5 T. R. 283.

(f) 15 Ves. 241.

(g) 4 D. & R. 391, 2 B. & C. 798.

(h) 2 W. & M. sess. 1, c. 5.

(i) Holt N. P. C. 460, 1 B. & A.

146.

(k) 6 D. & R. 247; 4 B. & C. 167.

not examined. [*Bayley, J.* There the examinant confined himself to saying that *he* did not know.] Lord *Ellenborough* says, "Looking at the object of the act of parliament, it is clear that the legislature intended that the hundred should have the knowledge of all the parties claiming the benefit of that act. It may be true, that as far as respects property, the possession of one joint tenant is the possession of all. But it does not thence follow that the knowledge of one is the knowledge of all; this act confers a benefit on certain conditions, one of which is, that the party claiming such benefit must make oath whether he or they have any knowledge of the persons that committed such act." In *The Duke of Somerset v. Mere* the premises were in the actual care of a servant; but the only person examined was the steward, who had not the care of the property, but lived at a distance. Here there was no servant in charge of the outhouses and barns which were destroyed. The plaintiff could not compel the tenant to go before the magistrates, nor had the latter any power of sending for him. They were acting only ministerially. *Helier v. Hundred of Benhurst* (a).

The fourth point taken is as to the matter of the examination; and it is objected that the plaintiff did not state that he entertained suspicion of the offender. It is necessary that the examinant should state whether he knows who the offender is. *Thurtell v. Hundred of Mutford* (b). That is all that the act requires; and, as was said in *William King v. Inhabitants of Bishop's Sutton* (c), it is dangerous to go out of the words of the act. In *Nesham v. Armstrong* the same objection might have been taken. Indeed scarcely any case can be supposed in which the examinant does not entertain some slight suspicion. But it is not usual to state these

(a) Cro. Car. 211.

(b) 3 East, 400.

(c) 2 Stra. 1247.

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suspicious, and their disclosure might be attended with dangerous consequences. Besides, though it is stated that the plaintiff had suspicions before and after, it does not necessarily follow that he entertained those suspicions at the time of the examination.

*Follett* contra. Upon the first point the defendant does not contend that a reversioner has not such an interest as will in general entitle him to maintain an action, but he denies that he has such a right given him by this act; and he submits that the word "persons" is not to be applied to distinct interests, but must be confined to persons jointly interested. Only one offence has been committed. Suppose, under the Riot Act (a), which contains no limitation in point of time, a tenant were to bring his action and recover 200*l.* in respect of his possessory interest, there would be no mode of apportioning this 200*l.* between the tenant and the reversioner, and yet the hundred cannot be liable to two penalties in respect of one offence. The property must be set fire to out of malice to the plaintiff in the action, and the malice will be taken to be against the person in possession. *Curtis v. Hundred of Godley* (b). This is a penal statute. In *The Duke of Somerset v. Mere* the point was taken at the bar, and left undecided. One of the objects of the statute was to stimulate the party to proceed by indictment, which the reversioner cannot do. This appears by the first section.

Upon the second point it may be observed, that the cases cited by the plaintiff are not upon this act, but upon others which are differently worded. As the law was understood to be at the time of the passing of this act, notice should have been given in this case on the

(a) 1 *Geo.* 1, stat. 2, c. 5.

(b) 5 D. & R. 73; 8 B. & C. 248.



Sunday. *Norris v. Hundred of Gawtry* (a), *Bellasis v. Hester* (b), *The King v. Adderley* (c). So in 2 Wms. Saund. 379, (3), both days are considered inclusive. [*Parke, J.* referred to *Glassington v. Rawlins* (d).]

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Upon the third point, it will not be denied that if the plaintiff was a proper person to bring the action, he was a proper person to be examined. But it is submitted that he was not the only person. If the reversioner's examination were sufficient, this provision of the statute would be rendered nugatory. [Lord *Tenterden, C.J.* Suppose the servant set fire to the house and was burnt.] The true construction of the clause seems to be "person injured," if he has the care of the property, or "servants" where they have the care of it. The reversioner could in the ordinary course of things have no means of knowing who had set fire to the property. [*Bayley, J.* *The Duke of Somerset v. Mere* only shews that where you resort to the servant, that servant must appear to have the charge of the property.] That was the decision in the particular case; but the reasoning is of a more general character. [Lord *Tenterden, C.J.* If you are right upon this point, you exclude the reversioner altogether.] The plaintiff does not give the hundred that information which will enable them to prosecute within the six months. This is founded on the principle of the old law, that the hundred should not be liable where the means of convicting the offender were withheld.

Upon the fourth point, it is submitted that the object was to enable the hundred to find out the offender. The plaintiff was therefore bound to communicate his suspicions. He might safely swear that he did not *know* who the offender was, unless he actually saw the felo-

(a) Hob. 139.

(c) Dougl. 463.

(b) 1 Ld. Raym. 280.

(d) 3 East, 407.

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nious act done. *W. King v. Hundred of Bishop's Sutton* merely shews, that saying "I suspect," without stating whether I know or not, is insufficient. It was there said, that the proper course would have been to say, "I suspect, but I do not know." If the plaintiff be in a condition to sue, it is admitted that he must be entitled to the whole 200*l.*

*Praed*, in reply. The statute 9 *Geo.* 1, c. 22, s. 7, provides that no person shall recover more than 200*l.*, but does not restrict the liability of the hundred to that sum. *Jackson v. Hundred of Calesworth (a)*. Here, however, it is too late for the tenant to bring an action. If the legislature had intended to narrow the time for giving notice in the way the defendant contends, it would have been easy to say, "on the same day or the next." [*Littledale, J.* While the fire continued the damage could not be ascertained; the examination, therefore, could not be completed. *Follett*, The order of the words shews that the barns were burnt before the parties left the spot.] The person who was in possession at the time of the loss may not have been living on the premises, and may know nothing about the matter. The condition precedent imposed by the statute is, that the examinant shall state whether he knows who committed the offence or not. That condition being performed, the magistrates may, if they think proper, make further inquiries.

*Cut. adv. vult.*

On a subsequent day Lord TENTERDEN, C. J. delivered the judgment of the Court.

The first objection taken to the plaintiff's right to recover in this action was, that he was not in possession,

(a) 1 T. R. 71.

but merely a reversioner. The 7th section of 9 Geo. 1, c. 22, gives a remedy "to all and every the person and persons injured"(a). No distinction is made between a party in possession and a reversioner; and we see nothing to restrain each from recovering to the extent of 200*l*.

The second (b) objection was, that the plaintiff was not the proper person to be examined. By the 8th section no person or persons shall be enabled to recover any damages by virtue of this act, unless he or they, by themselves or their servants, within two days after such damage or injury done him or them by any such offender or offenders as aforesaid, shall give notice, &c. (c). If the plaintiff was not the proper person, it would follow that no person could be examined, for no servant of the plaintiff had the care of the premises. The statute is in the alternative, and we are of opinion that the plaintiff was the proper person to be examined; though where a servant has the care of the premises, and the owner knows nothing of the transaction, the servant ought to be examined.

The third (d) objection was, that the plaintiff did not disclose his *suspicion*. The examination states that the plaintiff did not know who the offender was, but it is

(a) See the corresponding provision in 7 & 8 Geo. 4, cap. 31, sect. 2, *ante*, 130, note (b).

(b) This objection was called the *third* by counsel during the argument.

(c) The words of 7 & 8 Geo. 4, c. 31, s. 3, are, "unless the person or persons damnified, or such of them as shall have knowledge of the circumstances of the offence, or the servant or servants who had the care of the property damaged, shall, within seven days after the commission of the

offence, go before some justice of the peace residing near and having jurisdiction over the place where the offence shall have been committed, and shall state upon oath before such justice the name of the offender or offenders, if known, and shall submit to the examination of such justice touching the circumstances of the offence, and shall become bound by recognizance before him to prosecute such offenders when apprehended."

(d) Fourth, in the argument.

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contended that he ought to have communicated the suspicion which he appears to have entertained. There is nothing in the act which makes it necessary to state a bare suspicion. The magistrate may examine and sift the matter, but the examinant cannot be bound to state mere suspicions, without matter of fact to support them. Such a statement might do injury in more ways than one. It might affect the character of an innocent man, and it might enable a guilty party to escape. The fourth (*a*) objection was, that the notice should have been given on the Sunday. It is quite impossible to reconcile the cases, or to deduce any clear principle from them. In *Lester v. Garland*, the Master of the Rolls thought that the Court should look to the circumstances of each particular case, and that one rule for ascertaining whether the day on which the act is done should be included or not, is to see whether the act is to be done by the party against whom the computation is made. We think that this rule may be applied to this statute. Here the notice is to be given by a party who may be wholly ignorant of the act with reference to which the computation is to be made. A contrary construction would very much narrow the remedy which it was the object of this statute to give to the party injured. If, instead of two days, the act had given only one day after such damage or injury done, it could hardly have been contended that the notice must have been given on the very day of the fire. Then if one day would not expire on the Saturday, could two days be said to expire on the Sunday?

Judgment for the plaintiff.

(*b*) Second, in the argument.

**The KING v. The Trustees of the late DUKE OF  
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**AN** appeal was tried at the last Michaelmas Quarter Sessions for the county of Chester by the trustees of the late Duke of Bridgewater, against a rate made for the relief of the poor of the township of Preston on the Hill, in the said county. The assessment upon the appellants was as follows :

Occupiers' Names.	Description of Property.	Rental.	Sum Assessed.
Trustees of the late Duke of Bridgewater.	Land taken for the Canal, Towing-paths, &c., with the profits arising therefrom, and Warehouses, Wharfs, Clay Shed, Stables, Offices, Gauging Docks, &c., adjacent.	£1,480 0s. 0d.	£185 0s. 0d.


The poor rate in respect of the occupation of land, should be assessed with reference to the sum for which the land would let, not upon the net produce.

The possessors of canal property consisting of the canal, towing-path, and warehouses and offices adjacent, are to be assessed upon the same principle as the occupiers of land.

The sessions amended the rate by reducing the amount of property upon which such rate was made from the sum of 1480*l.* to the sum of 1164*l.* 15*s.* 2*d.* and confirmed the rate so amended, subject to the opinion of the Court upon the following case :

The rate was duly made in point of form. The grounds of appeal were, that the principle upon which the appellants were rated was erroneous, inasmuch as it appeared that they were rated in proportion to the full amount of their gross receipts, as owners, as well as occupiers of the rated property in the respondents' township, whereas it appeared that the property of other inhabitants (who were occupiers of farms and premises, and who were named in this said rate, and upon whom notices containing the grounds of appeal had been served,) was rated only in proportion to the amount of the respective rents paid by them as occupiers of their said farms and premises, whereby the property of the appellants in

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the said township was greatly overrated in proportion to the other property therein. And other grounds of appeal were, that the profits arising from the occupation of farms and farming stocks, were either improperly omitted to be assessed according to the full value thereof, or were greatly underrated in proportion to the assessments made upon the tolls and income arising from the property of the appellants. And, lastly, that certain allowances and abatements (other than such allowances as were necessarily made to the appellants in the management of their property for collection, repairs, and every other attendant expense,) were made as far as regarded the above mentioned persons and profits, by assessing them on the rent only, which were not made in the case of the appellants. By several acts of parliament passed in the 32d & 33d years of the reign of *Geo. 2*, and the 3d & 6th years of the reign of *Geo. 3*, the late Duke of Bridgewater was empowered to make and extend certain canals communicating chiefly between Manchester, in the county of Lancaster, and the river Mersey at Runcorn Gap, in the county of Chester, and in consideration of the great charges and expenses to which the Duke was necessarily put, these acts authorized him to receive certain tolls upon the tonnage of all coals, goods, &c., which should pass along the said canals, but exempted from toll all stones and gravel for any highway in either of the above mentioned counties, and all manure carried by any person occupying land near the said canal. The appellants are the trustees of the late Duke of Bridgewater, and do not any of them reside within the respondents' township, but are the owners and occupiers of the canal, upon a portion of which (to the extent of 1 mile and 3-16ths of a mile, passing in and through the said township,) part of the above rate, amounting to the sum of 644*l.* 15*s.* 2*d.* for lands taken for the canal, towing-paths, &c. with the

profits arising therefrom, was made. With respect to the remaining sum of 510*l.* for warehouses, wharfs, clay shed, stables, offices, guaging docks, &c. adjacent, there is no question to come before the Court. The appellants derive no profit whatever from the said land in the respondents' township, except by the tonnage payable to them by virtue of the above mentioned acts of parliament, but they are carriers on the canal, and receive freight for goods carried in their own vessels through the respondents' township, but the tonnage duty upon the goods so carried by the appellants, is included in the above sum of 644*l.* 15*s.* 2*d.* (a). Personal property, and profits in trade are not assessed to the relief of the poor in this township. The occupiers of land and houses in the said township are rated in the present assessment, as in all former assessments, at four-fifths of their respective rents, taking those rents as the criterion of the value of the land. The full amount of the tolls arising to the appellants from the canal and towing-paths in the said township, independently of their receipts as carriers for freight, but including the tolls upon the goods so carried by them, is 1272*l.* 4*s.* 0*d.* from which 466*l.* 5*s.* 0*d.* being deducted for repairs and collection, &c. the sum of 805*l.* 15*s.* 0*d.* is left, upon four-fifths of which, namely, the sum of 644*l.* 15*s.* 2*d.*, the appellants, as owners and occupiers of the part of the canal in question, were rated in respect of the tolls received or earned by them, no part of their receipts as carriers (except the tonnage on such freights) being comprised in the rate. The question for the consideration of the Court is, whether the sum of 644*l.* 15*s.* 2*d.*, being four-fifths of the amount of the clear annual balance arising from all the tolls of the canal within the respondents' township, after deducting all expenses of collection, repairs, and every other

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attendant expense of that description, be or be not a proper criterion of value upon which such rate ought to have been made, with reference to the profit necessarily arising from farms and other ratable property in the said township, the occupiers of such farms and other property being assessed upon four-fifths of the amount of their respective rents alone. And if this Court shall be of the latter opinion, the order of sessions to be quashed.

*F. Pollock and Deacon*, in support of the order of sessions. With reference to other property in this township, this rate is properly imposed. *The Queen v. Barkington*(a), *The King v. Brown*(b). If the trustees had been rated for their gross receipts, they would not have been rated upon the same principle as others, and the rate would have been clearly bad; but here a considerable deduction has been made for the outgoings, after which, the rate has been assessed at four-fifths of the remainder. If it should not appear whether the rent would be less, that might be a reason for sending the case back to the sessions, but the Court will not presume that there is any difference between the rent and the clear profits. [*Bayley*, J. Rent and profits are very different things.] Here the trustees are not rated on their profits. [*Bayley*, J. Suppose a farm being occupied by the owner, he makes from it 200*l.* a year, you say he should be rated on this sum, but he may perhaps, only make in rent 100*l.* per annum.] Property of this description is different from farming property. The question is, what will any one give for the tolls. [*Bayley*, J. And if the sessions will tell us what any one will give for these tolls, we shall know how to deal with the case. Has not this point been determined? Sir *James Scarlett*. In the case of *The King v. Attwood*,(c).] A farmer is not ratable for his

(a) 2 *Ld. Raym.* 1280. (b) 8 *East*, 528. (c) 6 *B. & C.* 277.



**stock.** *The King v. Attwood.* For that reason it would be improper to rate him upon the whole profits, part of which arises from the stock. But the general principle of rating, is the profit actually made. Nothing has been adduced to shew that the tolls would be worth less to let for than the sum at which the trustees are rated. The tonnage duties are, in effect, the rent.

Sir J. Scarlett, Cottingham and Lloyd, contra, were stopped by the Court.

BAYLEY, J. The rate is to be made on the proprietors as occupiers of land, &c. A rule of rating is to be laid down applicable to every description of occupiers, otherwise, you do not rate all persons equally. If a party occupy as farmer he pays a rent for the privilege of occupying. This rent is not supposed to be the full amount of the profits of the farm, nor of the profits after deducting the expenses. The trustees here are owners and occupiers. The only rule for the sessions to adopt was, what the property would have been worth to let. This rule, which should have guided them, they have not followed. I lay out of the consideration, the fact that the proprietors were also carriers (a). We are not to look to the profits of trade, but to the occupation of land by the trustees. If rent be the criterion of value in other cases, it ought to be so in this. The rate had better be sent back to the sessions, to be amended according to the principle laid down in *The King v. Attwood* (b), namely, of making the assessment upon what the tolls would be worth to let. We recommend this course as most beneficial to the trustees, and we send this case back to the sessions with that view.

Case remanded to the Sessions (c).

(a) *Ante*, 141.

(b) 6 B. & C. 377.

(c) And see *The King v. Tomkison*, *post*; 9 B. & C. 163.

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## The KING v. The Inhabitants of DITCHEAT.

Under 6 Geo. 4, c. 57, a pauper renting a dwelling-house for a year at the yearly rent of 10*l.*, paying rent for a year, and residing forty days, but underletting part of it, is the "occupier," and thereby acquires a settlement: per *Littledale* and *Parke, Js.*; *dissentiente Bayley, J.*

TWO justices, by their order, removed *Martha Jerrard*, the wife of *Thomas Jerrard*, then in St. Thomas's Hospital, in the borough of Southwark, in the county of Surrey, and their children, from the parish of Ditchet to the parish of Lyncombe-and-Widcombe, both in the county of Somerset. On appeal, the sessions quashed the order, subject to the opinion of this Court upon the following case.

The pauper's husband rented a tenement in Lyncombe-and-Widcombe by the year, viz. from Lady-day, 1825, to Lady-day, 1826, at the yearly rent of 15*l.*, with liberty to quit at any time on giving a quarter's notice. After the first month's occupation, the pauper's husband left the pauper living in the tenement, and went to London, and remained there about seven months, during which period she remained in the tenement, and until she quitted it as after mentioned; and she paid the year's rent, the receipts for which were given as if it had been received from her husband. A few days after the 25th of March, 1825, the pauper's husband let an apartment in such tenement to one *Gay*, at the yearly rent of 8*l.*, payable quarterly, with liberty to quit at any time on giving a quarter's notice; and the same was occupied by *Gay* from the time of his taking, until the 25th of March, 1826, and his rent paid to that time. The pauper's husband gave notice at Christmas, 1825, to quit at Lady-day, 1826. The landlord permitted the pauper to occupy part of the tenement until Midsummer, 1826, on paying him 38*s.* for the same; and the pauper quitted at Midsummer, 1826. The pauper's husband never paid any parochial rates, although rated.

*Moody*, in support of the order of sessions. The

pauper's husband acquired no settlement in the appellant parish for two reasons; first, because *he* never resided forty days in that parish; and, secondly, because he had not the exclusive occupation of the tenement. First, the husband never resided forty days upon the tenement. The case does not find that he did so, and the fact cannot be presumed. His wife and family did reside for a sufficient period, but that will not serve for the purpose of *his* acquiring a settlement; *Rex v. South Lynn (a)*, *Rex v. St. George, Southwark (b)*; if it would; the husband and wife might each acquire a settlement in distinct parishes at the same time. Besides the period of the occupation is important: it was from Lady-day, 1825, to Lady-day, 1826. It commenced while the 59 Geo. 3, c. 50, was in force; but that statute was repealed

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(a) 5 T. R. 664, where it was held, that a residence of thirty-three days by a widow on a tenement of 10*l.* a year, could not be coupled with a residence on the same tenement with her husband for sixteen days preceding, so as to give her a settlement.

(b) 7 T. R. 466. There the pauper took a tenement of 10*l.* a year in one parish, and after living in it with his family five days, was arrested and sent to prison in another parish. His wife and children continued in the tenement seven weeks longer: it was held, that no settlement was gained. In *Rex v. Crayford*, 9 D. & R. 80, 6 B. & C. 68, a man hired a house at 12*l.* a year for a whole year. He occupied the house, with his wife and family, till within three days of the expiration of the year, when he

died. He had previously paid the rent for three quarters of the year. His corpse remained in the house until the year expired, as did his widow and children, and his widow paid the fourth quarter's rent: it was held, that he gained no settlement under the 59 Geo. 3, c. 50, which could be communicated to his wife and children. And in *Rex v. Carshalton*, 9 D. & R. 132, 6 B. & C. 93, where a person, after the passing of the 59 Geo. 3, c. 56, hired a tenement of the annual value of 10*l.*, and occupied it for more than a year, but died before a whole year's rent was paid: it was held, that he gained no settlement, though after his death, and after the passing of the 6 Geo. 4, c. 57, the rent was paid out of money produced by the sale of his goods.

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by the 6 Geo. 4, c. 57, which came into operation on the 22d of June, 1825, on which day the settlement of the pauper was not completed. In order to confer a settlement, the whole period of occupation must be under one statute or the other. The words of the latter statute are wholly prospective; therefore, the period commenced under the repealed statute cannot be added to the period of occupation under the latter. That was the construction put upon the first statute, and the same ought to be applied to the latter; *Rex v. St. Mary-le-bone (a)*. If a different mode of calculation had been contemplated, the words would not have been all future and prospective. But even if the two periods can be connected, still all the conditions required by the 6 Geo. 4, c. 57, which passed on the 22d of June, 1825, must be shewn to have existed from that time. Now that is not so in this case, because the house was not occupied by the person hiring the same. Secondly, the pauper had not the exclusive occupation of the house, which is necessary under both the acts of parliament. The 59 Geo. 3, c. 50, was repealed by the 6 Geo. 4, c. 57, and it is a principle of construction that the same rules shall be applied to statutes made in *pari materia*, *Rex v. North Collingham (b)*. The 59 Geo. 3, c. 50, required that the *house* should be *held*, and the *land occupied* by the person

(a) 4 B. & A. 681. There a pauper hired a tenement of more than 10*l.* a year, and resided in it more than forty days altogether, but only thirty-eight days before the passing of the 59 Geo. 3, c. 50. It was held, that this conferred no settlement, the forty days not having been completed before the statute was passed. So with respect to the payment of rates, it has been held, that a

residence of forty days, previous to the passing of the 6 Geo. 4, c. 57, upon a tenement worth more than 10*l.* a year, by a party charged to, and having paid parochial rates, will not confer a settlement, unless all the forty days be subsequent to such payment. *Rex v. Ringstead*, 1 M. & R. 448; 7 B. & C. 607.

(b) 2 D. & R. 743; 1 B. & C. 578.

hiring the same, for the term of one whole year at least. The 6 Geo. 4, c. 57, abolishes that distinction, and requires that "the *house* or building, or *land*, shall be *occupied* under such yearly hiring, and the rent for the same actually paid, for the term of one whole year at the least." Now the word *occupied* in the latter statute must receive the same construction as that which was given to it by the decisions on the former statute; and it has been held in several cases that the word *occupied* in the 59 Geo. 3, c. 50, was not satisfied, unless the party had the *exclusive occupation* of the *land*. If the tenement was a *house*, and part of it was let out in lodgings, a settlement might be gained by reason of the word *held*; *Rex v. North Collingham* (a). In that case *Abbott, C.J.* said, "The word *held*, used in the statute, is applied to the dwelling-house, and if that be construed fairly, it seems to me, from the finding of this case, that the pauper's husband (who let off part of the house to a lodger) *held* the whole of this tenement. The difference of expression *held*, as applied to the house, may have been intended by the legislature to meet the case of lodgers, properly so called, and to prevent the question arising, whether a person could be said to occupy a whole house, provided he let the whole or part of it in lodgings" (b). *Rex v. Great Bolton* (c) is to the same effect, where Lord *Tenterden* said, "The safest course, in the construction of this or of any other statute, is to give effect to the different words contained in it, otherwise we must suppose different words to be used in the same sense. In the case of a house, it is therefore sufficient if it is held, in the case of land it must be occupied" (d). But if the tenement consisted of land, no joint occupation would

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(a) 2 D. & R. 743; 1 B. & C. 578. (c) 2 M. & R. 227; 8 B. & C. 771.

(b) 2 D. & R. 748.

(d) 2 M. & R. 230.

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suffice. *Rex v. Tonbridge (a)*. In that case *Bayley, J.* said, "By the 59 *Geo. 3*, c. 50, it was required, in case of a house or building, that it should be *held* for a year by the person hiring it, in the case of land, that he should *occupy*. In the case of houses and buildings, therefore, so as the term subsisted, it was, in this respect, before the statute of 6 *Geo. 4*, c. 57, sufficient; so that underletting a part of a house or building would not have prevented a settlement; and that point was accordingly so decided in *Rex v. North Collingham*. But in the case of lands, the person hiring was to *occupy* for the year. Did the pauper, then, occupy the garden for the whole year? It is stated in the case, that though the pauper took the garden, it was agreed between him and *Maynard*, that they should share the expense and profit. It is also stated, that *Maynard* paid the pauper half the rent, and that the garden was thus occupied. It is not in terms stated that there was a joint occupation; but as *Maynard* was entitled to participate in the occupation, we think it must be taken that he did, and if so, the pauper cannot be considered as occupying more than a moiety of the garden. Unless the garden was *separately occupied* by the pauper the whole year, no settlement was gained" (b). His lordship had previously observed, that the distinction made in the 59 *Geo. 3*, c. 50, between houses and buildings on the one hand, and land on the other, was removed by the 6 *Geo. 4*, c. 57; by which he must have meant, that the latter statute, retaining the word *occupied* only, required a separate and exclusive occupation of the tenement in all cases, whether of house or land. [*Parke, J.* There is this distinction between the two acts of parliament—the former required the occupation of the tenement to be *by the person hiring the same*; in the 6 *Geo. 4*, c. 57, those words are omitted.]

(a) 9 D. & R. 128; 6 B. & C. 88.

(b) 9 D. & R. 131.

That is so, undoubtedly; but the latter act must be construed as if it contained those words. The legislature must have intended those words to be supplied, for without them, the conditions requisite for a settlement might be performed by other persons than the party acquiring the settlement; and this absurdity would follow, that a man might hire premises for a year, and the very next day assign them, and himself be absent and altogether unconnected with them for the rest of the year, and yet acquire a settlement. The words "occupied under such yearly hiring," in the 6 Geo. 4, c. 57, are equivalent to the words "occupied by the person hiring the same," and evidently imply, that the occupation is to be by the person by whom the yearly hiring is made. Here, the occupation was not exclusively by the pauper, the person who hired the tenement, consequently he acquired no settlement which could be imparted to his wife and children.

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*Rogers*, (*Jeremy* was with him,) *contra*. The Court cannot speculate upon what was the intention of the legislature, but must collect their intention from the words which they have used in the act of parliament; *Rex v. Tonbridge* (a), *Rex v. Sturton by Stow* (b). But before the words of the present statute are looked at, it is important to consider what was the state of the law before that statute passed, and what alteration has been introduced by that statute, particularly as regards the occupation of a tenement. Under the 13 & 14 Car. 2, the period for which the tenement was hired, for which it was occupied (after forty days), or by whom it was actually occupied, was immaterial. Under the 59 Geo. 3, c. 50, it was necessary that the tenement should be

(a) 2 M. & R. 227; 8 B. & C. 771.

(b) 6 D. & R. 110; 4 B. & C. 87.

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hired for a year, and, if it consisted of a house, that it should be *held*, or, if of land, that it should be *occupied*, for a year, *by the person hiring the same*. The concluding words override the whole sentence, and apply to every separate branch of it; and yet the house need not have been occupied under the original hiring, for the occupation of the same tenement under different hirings might be connected, *Rex v. Sturton by Stow*; or different tenements might be hired at different times, *Rex v. North Collingham (a)*. The 6 Geo. 4, c. 57, requires the occupation to be under the yearly hiring, but it does not in terms require it to be by the person hiring the tenement; those words are omitted, and must be taken to have been omitted purposely; the one restriction is substituted for the other. It is the same with respect to the payment of the rent. By the 59 Geo. 3, c. 50, the rent was required to be paid by the person hiring the tenement; in the 6 Geo. 4, c. 57, the latter words are omitted, and it has been decided that under that act the whole rent need not be paid by the person hiring the tenement, but that it is enough if it be "actually paid," in the very words of the statute; *Rex v. Kibworth Harcourt (b)*. [Bayley, J. The expression "under such yearly hiring" may not have reference to the person paying the rent, and yet may have reference to the person occupying; how can a sub-tenant be said to occupy under a yearly hiring made by another person? He occupies under that *and something more*, namely, the contract between himself and the original hirer. If occupation for a year is not required of the person hiring for a year, it is difficult to imagine why it is required at all, as a condition of obtaining a settlement.] The 6 Geo. 4, c. 57, must now be regarded as if the 59 Geo. 3,

(a) 2 D. & R. 743; 1 B. & C. 578.

(b) 1 M. & R. 691; 7 B. & C. 790.



c. 50, had never existed, *The Bishop's case* (a), *Tuttle v. Grimwood* (b). Supposing it never to have existed, the 6 Geo. 4, c. 57, only requires that the pauper shall rent for a year, and that the tenement shall be occupied under the yearly hiring, both which requisites have been complied with in the present case; and it is immaterial who the occupier is, provided the relation of landlord and tenant, as originally created, endures for the whole year. But, conceding that the statute requires that the tenement shall be occupied the whole year by the person hiring the same, there has still been a sufficient occupation in this case, because the occupation of an under-tenant must in general be considered, with respect to the lessor, as the possession of his lessee; *Rex v. Aberystwith* (c). *Gay* was only an inmate, and an inmate who goes in by the same door is in the nature of a lodger, and if his room is robbed it is burglary; yet the indictment must lay it to be the dwelling-house of him who let it, and not of the inmate (d).

(a) 12 Co. Rep. 7.

(b) 3 Bingh. 496.

(c) 10 East, 354, where it was held that one who went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, (which for that purpose was parted off with laths from the rest,) and left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual, was liable to be rated to the relief of the poor, as occupier of the whole house. And see *Rex v. St. Mary the Less in Durham*, 4 T. R. 477, where it was held that if the owner of a

house occupy part of it, he is liable to be rated to the relief of the poor for the whole, unless there be a distinct occupation of the rest by some other person.

(d) "A room or lodging, in any private house, is the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and the lodger enter by different doors. But, if the owner himself lies in the house, and hath but one outward door by which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner. *Kel. 84; 1 Hale, P.C.*

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BAYLEY, J.—The statute 59 Geo. 3, c. 50, is repealed by the statute 6 Geo. 4, c. 57, therefore the question in this case is, whether a settlement was or was not acquired under the last-mentioned statute. By the 59 Geo. 3, c. 50, a settlement could not be acquired in the case of a house or building unless such house or building were held, or in the case of land unless such land were occupied, and the rent for the same actually paid, for the term of one whole year at the least, *by the person hiring the same*. That statute, therefore, contained an express enactment that the house should be *held*, and the land *occupied*, and the rent paid, *by the person hiring the same*. The words of the 6 Geo. 4, c. 57, are different. That statute is wholly silent as to the person hiring being required either to occupy, or pay the rent, and it has been decided in *Rex v. Kibworth Harcourt* (a), that according to the true construction of that statute, the rent need not be paid by the party hiring. The words “by the person hiring the same” must, therefore, be considered as erased from the statute 6 Geo. 4, c. 57, and the law to be altered, so far as it required the rent to be paid by the person hiring the premises; it is now sufficient if the rent be paid, whether by the person hiring the premises, or by any other person. The words of the statute 6 Geo. 4, c. 57, are, that the house or building, or land, shall be *occupied under such yearly hiring*, and the rent for the same, to the amount of 10*l.*, actually paid, for the term of one whole year at the least. The language here is varied, for the statute says, not that the house or land shall be occupied *by the person hiring the same*, but only that it shall be occupied *under*

556.” 4 Bla. Comm. 225; 18th ed. And see *ibid.* 226, n. (9), where the cases are collected.

(a) 1 M. & R. 691; 7 B. & C.

790; confirmed by the whole Court in *Rex v. Great Bolton*, 2 M. & R. 227; 8 B. & C. 771.

*such yearly hiring.* The question then is, what is the true meaning of occupation *under such yearly hiring.* It is somewhat difficult to decide with certainty upon the real meaning of the legislature, where it is not, as in this instance, expressed in very intelligible language, but I incline to think the true construction of these words is, that the premises shall be occupied by the person to whom that hiring gives the right of occupation, and that occupation by any other person to whom that right is given, either by assigning or underletting, is not an occupation under the yearly hiring, within the meaning of the statute. That is the present impression on my mind; if between this time and to-morrow morning I should change my opinion, I will communicate it to the Court (a). My learned brothers are of opinion that the words "under such yearly hiring" do not make an occupation by the person hiring requisite, but that it is sufficient if either he himself, or any other person under him, occupies. As at present advised, I think that a person occupying as an under-tenant, though he may be said in some sense to occupy under the yearly hiring, cannot be said to occupy under the yearly hiring within the meaning of this clause of the act of parliament, because he has no connection with the person who is landlord with respect to that yearly hiring, and because though he does occupy in part under that yearly hiring, he does not in toto; he occupies under that *and something more.* With respect to the other question, namely, whether the holding previous to the 22d of June, when the 6 Geo. 4, c. 57, came into operation, and the hold-

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(a) His Lordship did not make any such communication at the period mentioned; but a contrary opinion was afterwards expressed by Lord *Tenterden*, in

the name of the whole Court, upon the same point; *Rex v. Great Bentley*, Hilary Term, 1830.

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ing subsequent to that period can be connected, I am of opinion that they may, provided the occupation previous to the 22d of June be such as satisfies the requisites of the 6 Geo. 4, c. 57; and, therefore, that if a party, before that statute came into operation, was in possession of a yearly tenement, and held it under such circumstances as that statute says shall be requisite in order to confer a settlement, a settlement will be conferred. There are no words in the 6 Geo. 4, c. 57, which import that the hiring shall be subsequent to the period when that statute came into operation. With respect to the residence of forty days, I think the case must go back to the Court of Quarter Sessions, in order that it may be stated more distinctly what the nature of the residence was, or whether the whole forty days' residence required was actually by the husband himself. The cause of the husband's absence, whether it was voluntary or by compulsion, or whether it arose from other circumstances, may perhaps become material.

LITLEDALE, J.—The principal question in issue in this case seems to me to depend upon the construction to be given to the word "occupied" in the statute of 6 Geo. 4, c. 57. There is a material difference between a holding and an occupation. A person may hold, although he does not occupy. A tenant of a freehold is a person holding of another, but he does not necessarily occupy. In order to occupy, a person must be personally resident either by himself or his family. In this case I think the husband was the occupier of the house during the whole period. It is not distinctly stated under what circumstances the apartment was let or occupied; but in an indictment for house-breaking it might clearly be described as the dwelling-house of the pauper's husband; and in an action for use and occupation he

might properly be described, not only as the holder, but as the occupier of the house. The statute 11 Geo. 2, c. 19, s. 14, which gives the action for use and occupation where the agreement is not by deed, takes a distinction between the words "held" and "occupied." It enacts, "that it shall be lawful for the landlord, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, &c., *held or occupied* by the defendant, in an action on the case for the use and occupation of what was so held or enjoyed." The statute 43 Eliz. c. 2, s. 1, imposes the rate for the relief of the poor upon the "occupier;" and that rate in this case must clearly have been assessed upon the pauper's husband for the whole house, although he underlet a part (*a*), for, as it is laid down by Mr. *Nolan* (*b*), "no lodger, though possessing the principal part of the house, was ever rated; but the owner, how small soever the part reserved for himself, is in the eye of the law the tenant for the whole, and is rated as the occupier." Therefore, as in an indictment for housebreaking committed in the apartment let to *Gay* the house might be described as the dwelling-house of the pauper's husband; as in an action for use and occupation he might be described as the occupier of the house; and as in a poor rate he might be assessed as the occupier of the whole house; it seems to me that he must be considered, in point of law, as having occupied and resided in the house. A man need not actually sleep or take his meals in a house, nor need his family actually inhabit the whole house, in order to make him the occupier; if he holds the whole house, and occupies part of it by himself or his family, the law considers him, for this purpose, the

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(*a*) See *Rex v. Aberystwith*, and *Rex v. St. Mary the Less in Durham, ante*, 151, (*c*).  
(*b*) 1 *Nolan's P. L.* 152; 3d ed.

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occupier. For these reasons I am of opinion that the pauper's husband may be considered as having occupied the house, within the meaning of the 6 *Geo.* 4, c. 57. If he had underlet the whole house, and occupied no part of it, the effect might, perhaps, have been different, because the word "occupation," applied to a house, undoubtedly implies personal residence; but if the lessee of a house dwells in any part of it, although he underlets the rest, he is considered in point of law the occupier of the whole. If this is the right construction of the word "occupied" as used in this statute, which I think it is, it follows that the pauper's husband occupied the house, and then the only remaining question is, whether there was forty days' residence by the pauper's husband. Upon that point there is some doubt, and it is an essential point, for the legislature did not intend by the 6 *Geo.* 4, c. 57, to alter the law in that respect. I agree with my brother *Bayley* that the case ought to be sent back to the Sessions to have this doubt cleared up, and the fact distinctly ascertained.

PARKE, J.—I have entertained considerable doubt in this case, but upon the whole I incline to think that there was a sufficient occupation, and that a settlement was acquired in the parish of Lyncombe and Widcombe. The question turns entirely upon the construction of the 6 *Geo.* 4, c. 57. My judgment may have the effect of defeating the intention of the framers of that statute. But it is a safe rule of construction not to speculate upon the probable intention, but to adhere to the words of an act of parliament in their grammatical and natural sense, unless it appears certainly and clearly from the context that they were intended to be used in some other sense. There is a material difference between the two statutes 6 *Geo.* 4, c. 57, and 59 *Geo.* 3, c. 50. The

last-mentioned statute expressly requires the house to be held, and the land to be occupied, and the rent to be paid, by the person hiring the same. The statute 6 Geo. 4, c. 57, omits the words "by the person hiring the same." It does not require that the rent shall be paid, or the house occupied, by the person hiring the same, but only that the house shall be occupied *under the yearly hiring*. Now those words may be satisfied by the continuance of the term, and by the occupation of a sub-tenant or assignee during the continuance of that term. It is not necessary for the purposes of this case to decide whether occupation by an assignee would be sufficient or not. There has been an occupation here by a person whose character is left doubtful, for it is not stated in the case whether he was a sub-tenant having an entire occupation of one part of the house, or whether he was a mere lodger. But it seems to me that there was an occupation by the pauper's husband under the yearly hiring, provided the premises continued in the occupation of any person entitled under the tenancy created by the yearly hiring. I find nothing in the context of this clause to shew that the words which are there used, taken in their plain natural sense, do not express the intention of those who used them; and I must, therefore, suppose that the legislature, when they repealed the 59 Geo. 3, c. 50, which expressly required an occupation by the person hiring, had reasons for omitting, and intended to omit those words in the 6 Geo. 4, c. 57. It may be that the omission arose from inadvertence on the part of the framer of the act, and it may have been intended to retain the former provision, that the occupation should be by the original hirer of the premises. But it seems to me that the words used do not expressly require such an occupation, and we are not to presume the intention of the legislature, we must

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collect it from the words of the act of parliament. Then if the meaning of the legislature be that which the words used naturally import, a settlement has been gained, provided there has been a residence of forty days. As to that the case is ambiguous, and for the purpose of ascertaining that fact, I agree that the case should go back to the Sessions.

Case sent back to the Sessions.

The KING v. ANN GREEN and others.

The objects of a charitable foundation, in the actual occupation of alms-houses, living rent-free, and liable to be removed at the will of the patrons, are beneficial occupiers, within the meaning of 43 *Elix.* c. 2, s. 1, and liable to be rated for the relief of the poor.

ON appeal by the defendants, widows, inhabitants and occupiers of certain houses and premises in the parish of Lee, in the county of Kent, against a rate made for the relief of the poor of that parish, dated 2d April, 1828, the Sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

The master and wardens of the Merchant Tailors of the fraternity of *St. John the Baptist*, in the city of London, are and have long been patrons of a charitable establishment for the relief of the widows of poor free-men of the company of Merchant Tailors. About three years ago the company purchased land in the parish of Lee, whereon they erected thirty alms-houses for the reception of such poor widows. The appellants are poor women, and are resident in the alms-houses as alms-women, and objects of the charitable establishment, and pay no rent for the same, and are also removable at the pleasure of the master, wardens and court of assistants of the company of Merchant Tailors. The land upon which the alms-houses are built, comprising about two acres, is the freehold property of the Merchant Tailors' Company; and the land was purchased, and the



alms-houses were erected and built thereon, at the sole expense of the company, out of the corporate funds. Before the purchase of the land as aforesaid, the same was rated on the occupier thereof, at the rate of 2*l.* 5*s.* per annum, and the parochial rates were regularly paid in respect thereof upon such rating.

The question for the opinion of the Court is, whether the appellants are liable to be rated for the relief of the poor of the said parish.

*Bolland* and *W. Clarkson*, in support of the order of Sessions, were stopped by the Court.

*D. Pollock* and *C. Law*, *contrà*. The appellants do not come within the fair meaning of the statute 43 *Eliz.* c. 2. By the first section of the statute the churchwardens and overseers of every parish are empowered to raise, weekly or otherwise, (by taxation of every inhabitant, parson, vicar and other, and of every occupier of lands, houses, &c. in the said parish, in such competent sums of money as they shall think fit,) a convenient stock of flax, hemp, &c., to set the poor on work: and also competent sums of money for the necessary relief of the lame, impotent, old, blind, and such other among them being poor and not able to work, &c., to be gathered out of the same parish, according to the ability of the same parish. The rate, therefore, is to be assessed upon the inhabitants and occupiers of lands and houses, "according to the ability of the parish." The latter words override and control all the preceding general words of the section. The ability of the parish, means the ability of every individual inhabitant and occupier. These appellants have no ability, therefore they are not within the meaning of the section, and are not ratable. The poor rate is not a tax upon lands and houses, but a tax upon

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the person in respect of property in lands or houses, and the ability arising therefrom, *Theed v. Starkey* (a). Lands or houses may, or may not, confer such ability, or they may, or may not, be evidence of it. In order to make a person ratable as an occupier, he must be shewn to have a beneficial occupation; he must be an occupier having ability. If the land or house yields no profit, the occupation of it is not beneficial, and is no evidence of ability; and such an occupier, having no ability *aliunde*, is not ratable. That is precisely the situation of the appellants in this case; they are not proper persons to be personally rated in respect of the houses they occupy: and the only persons ratable, are those who are proper persons to be personally rated in respect of the premises they occupy. In *Rex v. St. Luke's Hospital* (b), it was held, that the hospital was not liable to poor rates for the lodging, &c., of the poor objects, Lord Mansfield observing that "it would be too gross to conceive them to be proper persons to be rated to the relief of the poor;" and in *Rex v. St. Bartholomew's Hospital* (c), that neither the governors, nor servants, nor the poor in the hospital, were ratable to the poor. In *Eyre v. Smalpace* (d), the officers of Chelsea Hospital, who had separate and distinct apartments, which were considered their dwelling-houses, and in which they and their families resided, were held ratable; but they had a beneficial occupation, which conferred ability upon them: therefore they were persons proper to be rated in respect of their occupation and ability. In *Rex v. Waldo* (e), it was held, that an alms-house wholly occupied by objects of a charity and their at-

(a) 8 Mod. 314. See 1 Nolan's P. L. chap. 6.

(b) 2 Burr. 1053; 1 W. Black. 1049.

(c) 4 Burr. 2435; 1 Bott, 5th ed. 139.

(d) Cald. 3; 1 Bott, 5th ed. 131.

(e) Cald. 358.

tendants, and of which no profit was made, although the absolute property in it was in the person who gave the alms, had no legal occupier, and that the proprietor was not ratable in respect of it. And in that case it was not attempted to rate the objects of the charity, but the donor; here the attempt is to rate the donors of the charity indirectly, through the objects of it. It was, indeed, decided in *Rex v. Munday* (a), that the objects of a charitable foundation in the actual occupation of the alms-houses and lands for their own benefit, in the manner prescribed by the rules of the institution, and liable to be dismissed for any breach of such rules, were ratable in respect of such occupation. But that case was essentially different from the present. There the occupation was a beneficial one; profit was made of the land and of the produce; the poor persons ploughed, sowed and reaped, and had their cattle upon the land; therefore they had a beneficial occupation; they were occupiers having some ability. Here the appellants are absolute paupers, having no beneficial occupation, and being possessed of no ability; therefore they are not ratable.

BAYLEY, J.—I think this a very clear case, both as regards the words of the statute of *Elizabeth*, and the authorities upon the subject, and I have no hesitation in coming to the conclusion that these persons are properly ratable as occupiers of tenements within the parish. The statute directs the money to be raised “by taxation of every occupier of lands, houses,” &c. In *Rex v. Catt* (b) it was held that the master of a free-school, appointed by the minister and inhabitants of a parish under a charitable trust, whereby a house and garden were assigned “for the habitation and use of the master

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(a) 1 East, 584.

(b) 6 T. R. 332.

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and his family, freely without payment of any rent, income, gift, sum of money, or other allowance whatsoever," for the teaching of ten poor boys of the inhabitants, was ratable to the poor for his occupation of the premises. Lord *Kenyon* there said, "to the authority of the cases cited I subscribe my assent. They proceeded on the ground that there was no occupier. In *Rex v. Waldo* (a) the rate was held to be bad, because there was no occupier; the poor children who were placed there for education could not be considered as occupiers, neither could the woman servant who superintended them. That case could not be distinguished from that of St. Luke's Hospital, where the rate was also quashed, because there was no beneficial occupier. But when a case arises where a person is found to be the beneficial occupier of a house, he must be rated, though the house be appropriated to charitable purposes. As long as Richmond Park continued in the hands of the king, it was not ratable: but when the ranger made profits of it, and beneficially occupied it, it was held to be ratable in his hands. So if this person had been put in merely to look after the pupils, and had not occupied the house, he would not have been ratable; but it appears that he is the beneficial occupier of this house and garden. By the old land-tax act, certain property given for charitable purposes is exempted from that tax: but there is no such exemption in the acts respecting the relief of the poor." In *Rex v. Munday* (b) the objects of a charitable foundation, in the actual occupation of alms-houses, were held to be ratable; and I cannot distinguish that case from the present in point of principle. The only difference is, that in that case the occupation was beneficial to a greater degree than it is here; there is merely the difference of plus and minus of

(a) Cald. 358.

(b) 1 East, 584.

benefit between the two cases. If the occupiers of alms-houses and lands belonging to a charitable foundation pay rent, they are clearly ratable; and if they do not pay rent, the consequence is that their ability is the greater. The objects of the charity in this case are, indeed, described as poor persons, but the Act of Parliament makes no distinction between poor persons and others. These persons are the occupiers of property from which they derive a benefit; therefore they are ratable. Mr. *Nolan*, in his treatise upon the Poor Laws (a), after citing the authorities upon this subject, says, "the distinction therefore as to where charities are ratable, and where they are not so, seems to depend upon this—whether there is any body who can be rated as *beneficial occupier*." I cite that work, not as an authority upon the subject, but merely for the purpose of shewing, that if the Merchant Tailors' Company, (the real appellants in this case,) or their legal adviser, had looked into the authorities collected in that work, they would probably have been satisfied that the rate was good, and would never have appealed against it.

LITLEDALE, J.—I entirely concur in the opinion expressed by my brother *Bayley* in this case. It is clear upon the authority of the case of *Rex v. Munday*, which cannot in substance be distinguished from the present, that the appellants were properly included in this rate.

PARKER, J.—I am of the same opinion. The parties rated were occupiers of houses within the parish, deriving a benefit from their occupation; therefore they were clearly ratable as occupiers within the meaning of the statute of *Elizabeth*. The fact of their being poor, and

(a) 1 Nolan's P. L. 164, 3d ed.

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paying no rent, and occupying houses furnished to them by charity, can make no difference, because it does not render the occupation less beneficial, but rather the contrary. The statute of *Elizabeth* makes no distinction between poor persons and others, nor do any other of the poor laws. There are many statutes which provide against persons residing in houses provided for them by charitable institutions, thereby gaining settlements (a); and if it had been intended to exempt such persons from ratability to the poor, there would doubtless have been statutory provisions made expressly for that purpose.

Order of Sessions confirmed.

(a) See 54 *Geo. 3.* c. 170. s. 6. *Rex v. Sandhurst*, 1 M. & R. 98, n.(a).

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The KING v. TOMLINSON.

A poor rate imposed in respect of two-thirds of the net rent of farms, lands and tithes, and of one-half of the net rent of houses and other buildings, collieries, and coal-mines, is not necessarily unequal.

UPON appeal, a poor rate made for Stoke-upon-Trent, in the county of Stafford, was amended, subject to the opinion of this Court on the following case:—

In the above rate, the occupiers of farms, lands, and tithes, and of market-tolls, were assessed, in respect of such property respectively, upon two-thirds of their estimated net yearly rent payable to the landlord; and the occupiers of houses, and other buildings, and of collieries and coal-mines, were assessed in respect of such property upon only one-half of their estimated net yearly rent, or royalty, payable to the landlord. Lessees of waterworks were assessed, in respect of their works and pipes within the parish, upon only one-half of their estimated yearly rental value; but the rate was amended by the Court, as to these lessees, by assessing them upon two-thirds of such rental value, being in the same proportion as in the case of land.

The question for the consideration of this Court is, whether as the occupiers of farms, lands, &c., are rated upon two-thirds of the estimated net yearly rent, the occupiers of collieries and coal-mines ought not to be rated in the like proportion, upon two-thirds of the estimated net yearly mine rent, or royalty.

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*Shutt and Godson*, in support of the order. There is nothing on the face of this rate to shew that its nominal inequality is not founded upon the greater amount of deductions attaching to one species of property. Then as no unequal principle of assessment is disclosed by the rate itself, no such inequality will be presumed. In *Rex v. Brograve (a)*, the assessment was upon three-fourths of the yearly value of land, and one-half of the yearly value of houses. Lord *Mansfield* said, that he thought it right that a difference should be made between lands and houses, for there are several charges incident to houses (as repairs, window-taxes, and such like deductions and outgoings) which do not fall upon lands, to lessen their value. And Mr. Justice *Yates* said, "The Court cannot enter into the inequality of it, unless it appears to us to be self-evidently, necessarily, and unavoidably unequal." They also cited *Rex v. Hardy (b)*, *Rex v. Sandwich (c)*, and *Rex v. Aire and Calder Navigation (d)*.

*Alderson and Whateley* contra. Net rent excludes the supposition of further deductions. The rate being manifestly unequal, this Court will quash it. *Rex v. Sellers (e)*.

BAYLEY, J.—By the rate in question, all property in

(a) 4 Burr. 2491, & 1 Bott,  
5th edit. 112.

(b) Cowp. 579.


(c) Dougl. 562; Caldec. 105.

(d) 2 T. R. 660.

(e) Caldec. 522, S. C. per  
nomen *Rex v. Lakenham*, 1 Bott,

5th edit. 116.

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this parish was assessed with reference to the net yearly rent; but in the case of lands, the rate is imposed in the proportion of two-thirds of the net rent; whereas upon houses and collieries, it is imposed in the proportion of one-half. Had this proportion been fixed by a rule evidently wrong the Court would be bound to interfere; but we are of opinion that a difference may with propriety be made in the proportion of net annual rent, in rating these two classes of property. What that proportion should be, it is the province of the quarter sessions to decide. The rate is to be assessed upon the *annual value* (a), whether the party be owner or tenant; but the annual *rent* exceeds the annual value by that portion of the former which ought to be set aside to meet repairs and other casualties. This portion would be greater in respect of houses, upon which more repairs in proportion to the rent are often necessary than will in general be required upon a farm. So in the case of collieries, prudence requires that a part of the annual rent be set aside to meet the necessary expenses of repairing and occasionally renewing the machines. It was contended that the sessions, in adopting the *net* rent as a standard, must be taken to have looked at the clear rent after every deduction made. This term is, however, frequently used to denote that rent which reaches the pocket of the landlord, after allowing taxes and other disbursements which the tenant is entitled to deduct from the gross rent, and also the charge of collecting. This construction will support the rate.

## Order of Sessions confirmed (b).

(a) In *Rex v. Brograve*, as reported 1 Bott. 5th edit. 112, Lord Mansfield says, "It is argued that the 'yearly value,' means the clear yearly value after all deductions, and that we ought to put that construction upon it,

and the rate would be unequal; but as it may with propriety have another construction, we ought to put such construction on it as will make it good."

(b) And see *The King v. Lord Granville*, *post*, 167.



## The KING v. LORD GRANVILLE.

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**LORD GRANVILLE** appealed against a rate made 22d February, 1828, for the relief of the poor of the parish of Stoke-upon-Trent, whereby he was rated for a colliery, including engines and railway, at 61*l.* 17*s.* 5*d.*, being a rate made upon the sum of 989*l.* 18*s.*; and the sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

The lessee and occupier of a coal-mine is ratable for the full annual value of the mine, though increased by improvements made at his own expense.

The appellant is the lessee and occupier of a colliery in the parish of Stoke-upon-Trent. In the year ending on the 31st of December last, he paid to his landlord for royalty a mine rent upon the coals raised from the said colliery, namely, the sum of 802*l.* 8*s.*, which sum is a *fair mine rent* for a tenant to pay upon the quantity of coals raised in that year. The sum of 802*l.* 8*s.* forms part of the sum of 989*l.* 18*s.*, upon which the appellant is charged. The appellant, some time since, erected several steam and other engines in the colliery, which are used solely in draining the mines and raising the coals to the surface; and he also laid down a railway, which is solely employed in facilitating the carriage of the coals. These form the machinery with which the mines are worked, and without which they could not be worked; and there could be no mine-rent at all, unless such machinery were used. The sum of 187*l.* 10*s.*, which is the remainder of 989*l.* 18*s.*, on which the appellant is charged, is a charge over and above the amount of the mine-rent introduced into the assessment in respect of the engines and railway. It is calculated that if the colliery were now to be let by the appellant to a sub-tenant, together with the engines and railway, the total sum of 989*l.* 18*s.* would not be more than a fair rent for such sub-tenant to pay. If the Court shall be of opinion that the ap-

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pellant ought to be rated for his engines and railway, in addition to what he ought to pay as mine rent to his landlord, then the rate is to stand; but if not, then the rate is to be reduced to 50*l.* 3*s.*

*M<sup>r</sup> Mahon*, in support of the order of sessions. The appellant is the occupier of coal-mines which the case finds to be of the annual value of 989*l.* 18*s.*, to let to a tenant; therefore he is ratable in respect of them to the full amount of that annual value. The case of *Rex v. Bilston (a)*, the decision in which no doubt gave rise to this appeal, is very distinguishable from the present case. There the engine, which was held not to be ratable, was erected and used exclusively for the purpose of draining the iron-stone mine, which was itself not ratable; and it was admitted that the engine was a burthen rather than a profit, and indeed a drawback from the profits of the mine. In this case the engine enables the occupier to raise a larger quantity of coal to the surface, and the railway affords advantages by facilitating the carriage of the coal. In both respects, therefore, the value of the property is enhanced, and the profits of the occupier increased. The occupier, then, must be rated according to that advancement of value and increase of profit, *Rex v. Attwood (b)*, where it was held that the lessee of coal-mines was ratable for the amount of royalty or rent which he paid, without making any allowance for money expended in rendering the mines productive.

*Godson*, contra. It is not intended to rely on *Rex v. Bilston* as an authority in favour of the present appellant; *Rex v. Attwood* is more in point. There

(a) 8 D. & R. 734; 5 B. & C. 851.

(b) 6 B. & C. 377; 4 D. & R. M. C. 348.

*Jones and Fereday*, two lessees of coal mines, had been rated only upon the annual sums paid by them for rents or royalties; and that was held to be the proper mode of rating them, although they had expended money in permanent erections on the mines, which, it must be inferred, produced an improved value. So here, the appellant being only lessee of the mines, should be rated only upon the annual sum paid by him for mine rent. If the owner of the mines occupied them, he certainly would be ratable upon their improved annual value, or, in other words, for the engines and railway, because he would be permanently benefited by the improved value produced by them. But a lessee, whose interest in the mines may be of short duration, and who has expended money in erecting machinery and otherwise improving the mines, ought not to be rated upon the improved value produced by such expenditure, because, until he is reimbursed his expenditure, the improvement in the annual value is of no real advantage to him. Besides, in this case, the lessee is in effect already rated for the engines and the railway, for the rate is proportioned to the quantity of coal raised, and the quantity raised being increased by the engines and the railway, the rate upon the coal is in reality a rate upon the engines and the railway.

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BAYLEY, J.—I entertain no doubt in this case. Whether the sessions have made proper deductions from the rate, we are not called upon to decide; the only question proposed for our consideration is, whether the appellant is liable to be rated for the engines and the railway. I am clearly of opinion that he is so liable. If the owner of the mines had been the occupier of them, he would have been liable to be rated according to their improved annual value; and where the owner of a mine erects

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machinery, or in any other way by expenditure of money improves the value of the mine, he is ratable for the value of the mine so improved by his expenditure. If he lets the mine in its improved state, he will receive the larger royalty from the tenant. If he lets it to a tenant who is to incur the expense of erecting machinery, the owner will receive the less royalty, but as a greater quantity of coal will be raised in consequence of the improvement, the tenant will by those means be reimbursed his expenditure, and in such cases the tenant, being the occupier, is, in my opinion, liable to be rated according to the improved value.

LITLEDALE, J.—The appellant, by erecting the engines and the railway has increased the annual value of the mines by 187*l.* 10*s.*, and the question is, whether he is liable to be rated for that increase? In ordinary cases the rate is to be made in proportion to the rent. In this case the appellant, by his improvements, has rendered the mines more productive. But it is quite immaterial, as regards the question of ratability, whether money is expended in improvements effected by the landlord, or by the tenant; their bargain may vary on that account, but the occupier of the property is the person to be rated, and he is ratable according to its improved annual value. The appellant, therefore, being the lessee and occupier of these mines, has been properly rated for their improved annual value.

PARKE, J.—Whether the rate is strictly correct in amount may be doubted, but we are not called upon to resolve that doubt. The sessions seem to have calculated the value of the premises according to the rent for which they might be let to an under-tenant. That, perhaps, may not be the proper principle upon which such

property should be rated, because the annual value is only part of the annual rent, and a portion of the rent should be considered applicable to repairing and maintaining the machinery, *Rex v. Tomlinson* (a), where that distinction is taken. But the only question put to us is, whether it is right in principle that the lessee of a mine should be rated for an increased annual value produced by improvements effected by himself. Upon that I feel no doubt; I think he has been properly rated for the improved annual value.

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Order of Sessions confirmed.

(a) *Ante*, 164.

### DELANE v. HILLCOAT.

**DEBT** upon the statute 3 Geo. 4, c. 126, s. 65 (a), for penalties. Plea, *nil debet*, and issue thereon. At the By 3 Geo. 4, c. 126, s. 65, no trustee of a turnpike road shall enjoy any office or place of profit under any act of parliament in execution of which he shall have been appointed, or shall act; and if any such trustee shall, without having first resigned such office, hold any such office, he shall forfeit 100*l*. A trustee who holds the office of treasurer, which may be made an office of profit, is within the penalty of the act, though he makes no profit of it in his own person.

(a) Which enacts, "that no trustee or commissioner of any turnpike road shall, from and after this act shall be in force, *enjoy any office or place of profit* under any act of parliament in execution of which he shall have been appointed, or shall act as trustee or commissioner, or have any share or interest in, or be in any manner directly or indirectly concerned in, any contract or bargain for making or repairing, or in any way relating to the road

for which he shall act, or for building or repairing any toll house, &c.; nor shall any such trustee or commissioner let out for hire any waggon, &c., for the use of any turnpike road for which he shall act as a trustee or commissioner; nor by himself, or by any other person for or on his account, directly or indirectly, receive any sum or sums of money to his use or benefit out of the tolls collected on the road for which he shall act, during

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trial before *Gaselee*, J., at the Berkshire Summer Assizes, 1828, the case was this. The defendant, on the 5th of August, 1822, was elected treasurer under a local act for repairing the turnpike road leading from the Old Gallows, through Wollingham, to Virginia Water. He was at that time a trustee under the same act, and he did not, upon his election to the office of treasurer, resign his office of trustee. Mr. *Roberts*, the clerk to the commissioners, who was an attorney, and also acted as a banker, and who had preceded the defendant in the office of treasurer, which he had resigned upon being appointed clerk, received all the rents of the tolls, and made all payments on account of the trust. The defendant never exercised any control over the money, and never made any profit of it. In the year 1822, the balance in the hands of Mr. *Roberts* was less than 200*l.*; in 1824, 1825, and 1826, it was more than 200*l.*; and in 1827, it was more than 600*l.* During all these years there was a fluctuating amount of debts owing by the trustees to various individuals, of from 200*l.* to 300*l.* In October, 1825, the defendant's accounts, as treasurer, were audited and allowed at a meeting, where he himself presided as chairman. The learned Judge being of opinion that the defendant could not be considered as holding any office or place of profit within the meaning of the act of parliament, nonsuited the plaintiff, but gave him leave to

the time he shall be acting as a trustee or commissioner of such road; and if any person, after having been appointed or elected a trustee or commissioner of any turnpike road, shall, without having first duly resigned such office at some meeting of the trustees of the road for which he shall have been elected or appointed, hold any such office or place, or

be concerned in any such contract or bargain, or let out for hire any waggon, &c., or receive any money out of the tolls as aforesaid, every trustee or commissioner so offending shall for every such offence forfeit and pay the sum of one hundred pounds to any person or persons who shall sue for the same."

move to enter a verdict for one penalty of 100*l.*, in case the Court should entertain a different opinion. A rule nisi had been obtained accordingly, against which

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*Alderson* now shewed cause. The nonsuit was right, and this rule must be discharged. The action is founded upon a highly penal statute, which must, therefore, be construed strictly; and so construing it, it is impossible to say that the defendant held an office or place of profit. There is no salary attached to the office of treasurer; there was never any cash balance lying in the defendant's hands; and the defendant never made any profit. It is not, therefore, such an office as the legislature contemplated, for the term "office of profit" must mean an office, not merely capable of yielding profit, but by which profit is necessarily and actually made. At any rate, the rule cannot be made absolute in the terms prayed for, because it was a question of fact for the jury, whether the office was one which yielded profit to any person; the utmost the Court can do, therefore, if they put a different construction upon the statute from that now contended for, will be to grant a new trial.

*Taunton* and *Talfourd* contra. The question arising upon this statute is, not whether the defendant actually made a profit of the office of treasurer in his own person, but whether it is an office of which, from its nature, he might have made a profit. It is said that the defendant had no salary, and that the cash balances were not kept in his hands. But suppose there were a salary attached to the office of treasurer, would it be less an office of profit because the treasurer permitted some other person to receive the salary? Certainly not. Neither is there any real distinction between the advantages of a fixed salary, and those notoriously resulting

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from a control over fluctuating balances of cash. Therefore, whether the possession of those balances produced a profit to the defendant, or to *Roberts*, is perfectly immaterial; and it is hardly possible to imagine that *Roberts*, as an attorney practising in the county, did not derive some advantage from having the control over the trust funds, inconsiderable as they were in amount. The fact that *Roberts* continued to act as treasurer in the defendant's name, after he could no longer safely do so in his own, in consequence of his having been appointed clerk to the trust, proves that the office of treasurer was one of value, and possessing desirable advantages connected with it. Even if the balances produced no profit either to the defendant or to *Roberts*, still, as either of them might have derived profit from their control over them, that brings the case within the purview of the act of parliament. At all events, the nonsuit was wrong, because the question whether the office of treasurer was in fact one of profit either to the defendant or to *Roberts*, ought to have been, but was not, left to the jury. Under any view of the case, therefore, the Court will make the rule absolute, either to enter a verdict for the plaintiff, or for a new trial.

BAYLEY, J.—I think the real and proper question in this case was, not whether the defendant in his own person actually made a profit of the office, but whether the office was in its nature such as might enable him to make it profitable either to himself or to *Roberts*. Now, if the available balance in the hands of *Roberts* were such, that it might be fairly and reasonably expected that a man of business would make a profit of it, the office of treasurer must be considered as one of profit within the meaning and mischief of the act of parliament. Instead of nonsuiting the plaintiff, therefore, the learned judge



should, as it seems to me, have left it to the jury as a question of fact, whether the average balance in the hands of *Roberts* was such that a man of business might fairly and reasonably be expected to make a profit of it. In this view of the case, I am of opinion that we ought to make the rule absolute for a new trial.

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LITLEDAL, J.—I am of the same opinion. If the average balance was so trifling in amount, that a banker would not have allowed interest for it, the office might, perhaps, in that case, be considered as not being an office of profit within the meaning of the statute. On the other hand, if it amounted to a sum for which a banker would have allowed interest, it must clearly be considered as an office of profit, whether the party receiving it obtained that allowance of interest or not (a). In that point of view it is immaterial, whether the defendant received the profit himself, or permitted *Roberts* to receive it, or whether neither of them received it;

(a) Query, whether, if the money be suffered to lie in the hands of a banker who allows no interest upon balances, but who is remunerated for his trouble by the profit which he, the banker, derives from the floating balances of his customers, this be not a sufficient profit within the act, either as a profit made by the treasurer or his agent, in the shape of the advantage which he derives from the services of his banker, or as a profit made by the banker as a person acting under the treasurer, *quoad* the receipt of the trust money. An agent paying money into his bankers' hands *generally*, and

using it as his own, is chargeable with interest, whether he receive interest or not. *Rogers v. Boehm*, 2 Esp. N. P. C. 702. So an assignee, *Trevors v. Taylor*, 1 Brown, C. C. 334. So an executor, *Newton v. Bennett*, *ibid.* 359; *Perkins v. Baynton*, *ibid.* 375; *Foster v. Foster*, 2 Bro. C. C. 616; *Littledale v. Gascoyne*, 3 Bro. C. C. 73; *Franklin v. Frith*, *ibid.* 433; *Horsley v. Chalenor*, 2 Ves. sen. 185. (But see *Gale v. Adams*, 2 Atk. 106. *Child v. Gibson*, *ibid.* 608.) So a partner, Pothier, *Traité du Contrat de Société*, ch. 7. Nos. 116, 119.

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the office was one of which profit might be made, and the defendant, by holding it jointly with his office of trustee, has incurred the penalty inflicted by the act of parliament.

PARKE, J.—The question in the case is, whether the office of treasurer is an office of profit within the meaning of the 3 *Geo.* 4, c. 125, s. 65. With a view to the proper decision of that question, I think it should have been left to the jury, upon the evidence, to say, whether there was such an average balance in the hands of *Roberts*, that it might reasonably be expected that the person holding that balance would make a profit of it. I agree, therefore, that there ought to be a new trial.

Rule absolute for a new trial (a).

(a) At the second trial of the cause before *Vaughan*, B., at the Berkshire Summer Assizes, 1829, it appeared upon the examination of Mr. *Roberts*, that the balances in his hands were always mixed up with moneys of his own; that he was accustomed to advance sums of money to different persons on interest, and that in so doing, he must occasionally have received interest upon advances in part composed of such balances; but that he had always available resources of his own, with which he could at any time have paid the whole fund due from him to the trust. Upon this evidence the learned Baron left it to the jury to say whether or not the office was an office of profit; telling them, that, in his opinion, if profit was made by *Roberts*, the office was an office of profit, as it was imma-

terial by whom the profit was made. The jury gave it as their opinion that the office was an office of profit, and that *Roberts* had made profit of it, and thereupon, under his lordship's direction, found a verdict for the plaintiff.

In Michaelmas term, 1829, *Ludlow*, Serjt., moved for a rule nisi for a new trial, upon the ground that the learned Baron had misdirected the jury in point of law. He contended, that in order to bring the defendant within the penalty of the statute, it should have been proved that *he*, personally, derived a profit from the office, and he cited *Skinner v. Buckee*, 4 D. & R. 628, 3 B. & C. 6, as an authority in principle, though decided upon a different act of parliament. He admitted that the statute in that case imposed the

penalty upon a party doing the prohibited act "*for his own profit*," but contended that the expression in the present statute, "*enjoy* any office or place of profit," bore the same meaning, and shewed that the legislature intended to impose the penalty on those only who "*enjoyed*," i. e. *personally received* a profit from the office.

The Court said, that the two acts of parliament were materially distinguishable. A man's "*enjoying* an office of profit," was a very different thing from his "*supplying goods for his own profit*." The case had been

once argued upon the very point now raised, and had been properly decided; the jury had at the last trial been directed in accordance with that decision, and had found a right verdict. It was wholly immaterial under this act of parliament by whom the profit was received; if the office was one by which profit was made, or might be made, either by the person holding it, or any other person who acted in it for him, it was an office of profit, within the meaning of the statute. And the motion for a new trial was refused.

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#### WINTER v. CHARTER (a).

**THIS** was an action on the case, brought by the plaintiff against the defendant, for prostrating and removing, and suffering and permitting to be prostrated and removed, parts of a certain hedge and fence lying between certain closes of the plaintiff and the defendant; it was admitted that the hedge and fence belonged to the said defendant, and that he had always kept up and maintained the same. The declaration also contained counts for permitting the said fence, after the same had been prostrated and removed, against the will and consent of the said plaintiff, to be and continue prostrated and removed; by means whereof the plaintiff's cattle strayed through

(a) This and the following case in error are taken, (by permission of Messrs. Young and Jervis,)

from vol. iii. of their Reports of Cases in the Court of Exchequer.

Where, upon the diversion of a turnpike road after the new road had been completed, but before the old road was stopped up, the trustees, by the permission of *B.*, broke down his fence to make a passage from the new road to the close of *A.*, but did not put up a gate or fence to protect the latter close:—  
 Held, that the

trustees were wrong-doers, and that *B.* was responsible for their acts.

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the said defects, and thence and over the said defendant's close, unto and into a certain public highway, and also other cattle, lawfully being and passing along the said highway, strayed over the said defendant's close, and unto and into the said plaintiff's close.

The action was tried at the last Summer Assizes, at Wells, before *Littledale, J.*, when a verdict was found for the plaintiff, with one shilling damages, subject to the opinion of the Court upon the following case.

The plaintiff was owner and occupier of a close called Rook's Castle, and the defendant owner and occupier of a close called Higher Field, otherwise Linhay Field, both in the county of Somerset. These closes were separated from each other by a fence or hedge, which the defendant was bound to repair, and both abutted, to the south, upon a certain public turnpike road, formerly the Taunton turnpike road, leading from Taunton to Hartrow Gate; the access to the said close of the said plaintiff was by a gate opening into the said road. By a certain order of the commissioners of the Taunton turnpike roads, bearing date 6th June, 1826, it was ordered that a new line of turnpike road should be made, leading from the south-eastern corner of a certain close, called Lynch-five-Acres, near the Lethbridge Arms Inn, to a certain beech tree in the said road from Taunton to Hartrow Gate aforesaid, in a direction to the north of the said closes of the plaintiff and defendant; which new road was to pass immediately contiguous to the north-east angle of the said plaintiff's close. By the same order, the old line of turnpike road was ordered to be stopped up, and the land and soil thereof to be vested in Sir *T. B. Lethbridge, Bart.*; but the former part of the said order only was confirmed upon appeal to the quarter sessions, and the old turnpike road, at the time in question, remained open to the public, no subsequent

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order having been made for the purpose of stopping it up. The new line of road was forthwith executed; and, by an order in writing of the commissioners of the said road, bearing date the 4th of December, 1827, it appeared that the report of a committee appointed by the said commissioners, stating that the said new road was completed in a substantial, sufficient, and workman-like manner, was received and approved. By a subsequent order of the said commissioners, bearing date the said 4th December, 1827, it was ordered that a passage or way should be opened from the said new road to the said plaintiff's said close, called Rook's Castle, through the hedge and ditch of the said close of the said defendant, he the said defendant having consented to the same in a paper writing produced at the meeting of the said commissioners, at which the said last-mentioned order was made. The said consent in writing of the said defendant was unstamped, and in the terms following: "I hereby consent that the commissioners of the Taunton turnpike road, or any other person or persons, may enter a close of land belonging to me in the parish of Bishop's Lydland, in the county of Somerset, called the Higher Field, otherwise the Linhay Field, and there to take down a sufficient part of the fence or hedge at the north-west corner of the said field or ground adjoining and abutting as well to a close of land called Rook's Castle, in the occupation of Mr. *John Winter*, as also to the new line of the Taunton turnpike road running in a northerly line from a field called Lynch-five-Acres, towards and unto a beech tree in the parish of Coombe Florey." This paper was dated the 4th of December, 1827, and was signed by the defendant.

Before this time application had been made to the defendant, for his consent to make the opening through his hedge into the plaintiff's close, that the commission-

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ers might be enabled to stop up the old turnpike road leading from Taunton to Hartrow Gate, as abovementioned. On the 10th of the said month of December, the hedge and fence of the said defendant were removed, and a part of the ditch filled up, by the surveyor of the Taunton turnpike road, and by the directions of the commissioners of the said road, leaving an open space sufficient for a gate and post, and opening a direct communication with the said new road, across and over the site of the said hedge so removed. The said surveyor told the said plaintiff, that what he had done was by the direction of the trustees of the road, and shewed a copy of the above last-recited order; the said surveyor added, that if the said plaintiff would lend him a couple of hurdles, he the said surveyor had a man who would take them and put them up in the gap, to prevent the stock from escaping; the plaintiff, however, refused, and added, that he had a gate already from the old road into Rook's Castle Field. No conveyance of the site of the said hedge and ditch so removed, or the space between the said plaintiff's close and the said new road, was ever executed by the said defendant to the said commissioners, nor was any other authority or license whatsoever given, except the consent in writing aforesaid; nor had any licence or consent been given by the said defendant to the said plaintiff, to place any gate or fence upon, or to pass over the site of the said hedge and ditch, being the defendant's close, unto and into the said new road; and it appeared that the said plaintiff could erect no sufficient gate or fence, in order to prevent the cattle in his said close from straying, or cattle from without entering thereon across the said gap, without placing the same upon or over part of the site of the hedge and ditch so removed; and that neither the said commissioners nor the said defendant had, after the removal of the

sa d hedge, erected, or caused to be erected, any hedge or fence upon the spot where the old hedge and ditch had been removed and filled up, nor had any application been made by the said plaintiff to the said defendant or the said commissioners upon the subject; but the plaintiff's close remained and continued from thence until the commencement of the said action, and at the time of the trial remained open and exposed to the said new turnpike road. The question for the opinion of the Court was, whether, under these circumstances, the plaintiff was entitled to maintain his action.

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*Jeremy*, for the plaintiff. It is found by the case that the defendant was personally liable, and until his interest be divested his liability will continue. To get rid of that liability, the defendant must shew either that he has parted with the possession of the close to which the liability attaches, so as to transfer the liability, or that what has been done was done in pursuance of some legislative authority. Now the license does not amount to a transfer of the possession; and that being so, it is clear that an action upon the case may be maintained against one who, being liable, licenses another to prostrate his fence. In this view the language of the license is very material, it does not amount to a dedication, nor does it confer a right of way; it gives the plaintiff no permanent interest, but may at any moment be determined at the caprice of the defendant. Can the act then be justified by any legislative authority? To prove this, it must be shewn that the trustees have authority to make a passage from the new road; and that, having that power, they have strictly pursued it. The trustees have no such authority. The statute 3 Geo. 4, c. 126, s. 88, upon which the defendant relies, after providing that when any turnpike road shall be diverted,

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and the new road made, the new road shall be subject to the same regulations as the old, and that the old road shall be stopped up and sold, enacts, that if such old road shall lead to any lands, &c., which cannot, in the opinion of the trustees, be conveniently accommodated with a passage from the new road, "which passage they are hereby authorised to order and lay out, if they find it necessary," then the old road is to be sold, subject to the right of way to such lands, &c. Now the power to make a passage, conferred by this section, can only apply to cases in which that accommodation may be made by contiguity, and must be inapplicable to lands which do not come in contact with the new road; for if the trustees may go over any portion of the land of a third person, they may make the passage over a whole field; and if over one, why not over several? For this purpose they have no authority to acquire land by purchase, much less to make the passage over the property of third persons. At all events, as the old road was not at the time stopped up, and no order for that purpose was then in existence, there could be no necessity for a passage; and therefore, in the greatest latitude of construction, this clause could confer no authority. But, conceding that the word "passage" may comprehend a branch road, still the trustees have not pursued their authority. Their first duty was to secure to the plaintiff a permanent right of way, which they have not done; for a mere parol license is revocable at will. By the provisions of the statute 4 Geo. 4, c. 95, s. 66, they were bound to fence and protect the lands adjoining from trespasses; this likewise they have neglected to do. Not having complied with the provisions of the statute, they are wrong-doers; and as there can be no obligation upon them, the land not being required for the new road, the defendant, who authorised this act, is properly responsible.



*Rogers*, for the defendant. Although the question is of inconsiderable moment, the principle is of great importance; for if these acts be construed rigidly, the intention of the legislature can never be carried into effect. The defendant is justified, if the trustees had jurisdiction; and even though they had exceeded their jurisdiction, the defendant is relieved, under the circumstances, from all liability. The new road having been completed, the trustees had authority to make the passage, under the statute 3 Geo. 4, c. 126, s. 88. It is said, however, that the old road had not been stopped up, and that therefore there was no necessity for the passage, and the ulterior powers of the trustees did not arise. It was absolutely necessary to make the passage before the old road was stopped up; for otherwise it would be a good objection, upon an appeal, to say, that, by stopping up the old road, all access to the close would be taken away. To say that the old road must be stopped up before the new communication is made, would be in violation of a plain enactment, for, until the access had been made, the road could not properly be stopped up. But it is immaterial which precedes, where the trustees act *bonâ fide*. The question of priority is properly in their discretion; and the case of *De Beauvoir v. Welch* (a) shews that in such cases their discretion is plenary. Indeed, by the completion of the new road, the old road is virtually stopped up, 3 Geo. 4, c. 125, s. 86, and the necessity of an order is dispensed with. This power of the trustees must be exercised according to the exigency of the case, and the convenience of all parties. It would be absurd to limit it to the single case of a close abutting upon the road; and in the statute no words warrant that construction. It is, however, said, that the plaintiff has acquired no permanent interest in the way, and that

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(a) *Ante*, vol. i. 7; 1 M. & R. 81; 7 B. & C. 266.

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therefore the trustees have not acted within the scope of their authority. By the 83d section they are empowered to purchase lands, but are not compellable to do so, if they can otherwise acquire a right; and upon the principle which decided the case of *Hollis v. Goldfinch* (a), it is clear that a right may otherwise be acquired. That right has in this case been acquired by the consent of the defendant, and by the order of the trustees, which, unappealed against, is final and conclusive, 4 *Geo. 4*, c. 95, s. 87. It must be admitted that the trustees have been guilty of a nonfeasance in omitting to fence the road; but the defendant having relinquished all his right by his license and omission to appeal, cannot be answerable for their nonfeasance.

*Jeremy* replied.

ALEXANDER, L.C.B.—The allegation, upon the part of the plaintiff, is, that the defendant is bound by law to maintain a fence which protects his field; that the defendant has not done so, but that, on the contrary, some person, by his authority and by his consent, has prostrated that fence, so that the field remains unprotected. Upon this statement there is a clear *prima facie* case, which requires an answer; and the answer which the defendant gives is, that the act complained of has not been done by him, but, with his consent, by some other person, who is authorised by legislative authority to do the act. The defendant takes upon himself the burthen of shewing that the act was authorised by legislative enactment, and it is incumbent upon him to shew that authority. By the 83d section of the statute 3 *Geo. 4*, c. 125, the trustees are invested with powers to alter roads; and then follows the 88th section, by which, if at

(a) 2 D. & R. 316; 1 B. & C. 205.

all, this act must be justified. That section enacts, "that when any turnpike road shall be diverted or turned, and the new road shall be made and completed, such new road shall be in lieu of the old road, and be subject to all the provisions and regulations in any act of parliament contained, or otherwise, to which the old road was subject, and shall be deemed and taken to be a common highway, and shall be repaired and maintained as such; and the old road shall be stopped up, and the land and soil thereof shall be sold by the trustees or commissioners to some person or persons whose land adjoins thereto, as in the act is mentioned with regard to pieces of land not wanted." And then follows the provision which applies more closely to this subject: "but if such old road shall lead to any lands, house, or place, which cannot, in the opinion of the trustees or commissioners, be conveniently accommodated with a passage from such new road, which they are hereby authorised to order and lay out if they find it necessary, then and in such case the old road shall be sold, but subject to the right of way and passage to such lands, house or place respectively." Upon this latter provision this question depends. Now it appears to me that this particular case is not specifically provided for by this section, because the framers of the act had nothing in view beyond the mere making of a road to the particular place, and the necessity of breaking through the land of a third person did not occur to them. It must be indifferent to the parties in what manner this passage is made, provided the plaintiff be put in the same situation in which he was before the road was diverted; and it is therefore surprising how this question has arisen. But he ought to be put in the same situation. He complains, however, that he has been inconvenienced; that they have not put the gate and fence to protect his field;

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and, in short, that they have not given him the way. Now although this inconvenience does not proceed from the immediate act of the defendant, yet, as he authorised the trustees to commit it, he should have stipulated that it should be done in such a manner, that the obligation cast upon him by law might be complied with. He has not provided for that; and, as the trustees had no authority to make the passage over his land without his consent, they must be taken to be his agents, and he is responsible for their acts. Upon this ground, without examining the other questions, upon which much might be said, I am of opinion that this action is maintainable.

GARROW, B. was of the same opinion.

HULLOCK, B.—I am of opinion that this action was, under the circumstances, sustainable, and that the verdict is right. This is an action on the case, complaining that a certain fence running through the fields of the plaintiff and defendant, to the repair of which the defendant is admitted to be liable, has been permitted to be prostrated and broken down, by means of which the plaintiff has sustained an injury. Were there no other circumstances in the case, the action would be clearly maintainable. But the defendant says, the act of which you complain does not originate with me, but is to be ascribed to the trustees, who are fully warranted by act of parliament in doing that which they did. If that could be made out, it would amount to a complete defence in point of law; but it has not been established. The order of the trustees to stop the old road was *coram non judice*, for their jurisdiction in that respect did not arise until the new road was completed; notwithstanding which, an order was made to divert and to stop up the old road at one and the same time. Were it necessary,

upon the present occasion, to give any opinion upon their authority to stop up the old road now, I should feel little difficulty in saying, that they have that power, either absolutely or subject to certain restrictions. In this respect they must exercise a discretion as to reserving a public or private right of way; for, by the act of parliament, the old road cannot be stopped up or sold, unless a new passage can be conveniently attained to the lands adjoining. There is now nothing to prevent the trustees from stopping up the old road, either absolutely or conditionally. But the question is, whether, the old road not having been stopped up, the trustees were justified, by the 88th section, in the course which they have pursued. It seems to me that they have exceeded their authority. Admitting, for the argument, that they had a right to open this way into the field of the plaintiff, still they had no right to leave it in the state in which they did leave it. They had no right to impose upon the plaintiff the necessity of making a gate, or of incurring any expense, he having a road which he was entitled to by law, and had always enjoyed. It might have been different had they opened the gap and put a gate there. But it is clear the legislature contemplated that the trustees were bound to protect the inclosures, when an act of this description was done, as is evident from the 66th section of the 4 *Geo.* 4, c. 95, which, although not in terms applicable to this subject, is sufficient to shew upon whom the legislature intended to throw the expense of fencing, when necessary in consequence of an improvement of the road. Nothing of this kind has been done, but, on the contrary, the close of the plaintiff has been left open and exposed. It is said that there is an order to make this passage, which, not having been appealed against, is final. But if the order was extra-judicial, and they had no authority to make it, the con-

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sent will be inoperative to confer an authority, and the question comes to the same point, had they jurisdiction. Without deciding whether the trustees were premature in the course which they pursued, or whether they were authorised at all, the ground of my decision is, that if they were authorised, they have not done that which, by the act of parliament, they were bound to do. They therefore were wrong-doers, and the defendant, who licensed their act, is answerable for the consequences, and liable in this action.

VAUGHAN, B.—I am of the same opinion. The liability of the defendant is admitted, unless he be discharged by the act of the trustees. In the highest and lowest offences all are principals, and if the defendant authorised the acts of the trustees, it must be considered in the same manner as if it were done by his own hand. This brings it to the question, whether the trustees had authority to do the act complained of. It appears, however, that whatever might have been their authority, they have not exercised it according to the powers given to them by law. If, by the 88th section, they had power to make the opening, they were not justified in leaving it as they did, without fencing and protecting it from the road and adjoining close. Upon this short ground, I think that the action is maintainable.

Postea to the plaintiff (a).

(a) See *Rex v. Winter*, ante, 46.

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**DEBT** upon the statute 17 *Geo.* 2, c. 3, for penalties.

The declaration stated that the plaintiff below (the defendant in error) was an inhabitant of the parish of *A.*, in the county of *G.*, and that, before, and at the time when, &c., the defendant below (the plaintiff in error) was the assistant overseer of that parish; that theretofore, to wit, on &c., at &c., the churchwardens and overseers of that parish made a certain rate for the relief of the poor of that parish, which rate was afterwards and before, &c., allowed by two Justices of the county, and published by the churchwardens and overseers of the poor, &c.; and that afterwards, and at a reasonable time in that behalf, to wit, &c., the plaintiff below requested the defendant below, as such assistant overseer, to permit him, the said plaintiff below, to inspect the rate, and then and there tendered him 1s. for the same; and that, although the said defendant below, as such assistant overseer, then and there had the rate in his possession, he did not, nor would, permit the said plaintiff below to inspect it: concluding with a claim for 20*l.* as a forfeiture under the statute. Plea—*nil debet*; and issue thereon.

The case was twice argued in the Court of King's Bench: on the first occasion, upon a motion for a new trial (*a*); and upon the second, upon a rule to arrest the judgment, which rule was discharged (*b*). Upon this judgment the defendant below brought a writ of error, which was now argued by—

(*a*) *Ante*, vol. i. 184; 1 M. & R. 482; 7 B. & C. 586.

(*b*) 8 B. & C. 702.

defendant, as such assistant overseer, had the rate in his possession, he refused to produce it; whereby, &c.;—*Held*, after verdict, that it was sufficient, because the allegation, that the defendant was an assistant overseer, could only be proved by the production of his appointment, in which his duties must be specified; and unless it had appeared, from the appointment, that he had a general authority to take care of the poor, or a limited authority to have the legal custody of the rate, the Judge would have directed the Jury to find a verdict for the defendant.

An assistant overseer appointed under the statute 59 *Geo.* 3, c. 12, is within the statute 17 *Geo.* 2, c. 3, and liable to a penalty for not producing the rate to an inhabitant when lawfully demanded, if, by his appointment, he be authorised to take care of the poor, or have a limited authority to have the legal custody of the rate.

A declaration for penalties under the statute 17 *Geo.* 2, c. 3, alleged that the defendant was an assistant overseer, that a rate was duly made &c., and that the plaintiff, an inhabitant, &c., at a reasonable time, demanded an inspection of the rate, and tendered 1s.; and that, although the

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*Ludlow*, Serjt., for the plaintiff in error. An assistant overseer is not a person within the meaning of the statute 17 *Geo.* 2, c. 3, s. 3, which gives the penalty. The persons included within that statute are, "church-wardens and overseers of the poor, or other persons authorised to take care of the poor." When that act was passed, an overseer was a public officer, well known by that name, the duties of whose office were perfectly understood. At that time, an assistant overseer was not known as a public officer; for it was then illegal to pay out of the poor rates a compensation to a deputy who might discharge the duties of the principal. By the statute 59 *Geo.* 3, c. 12, s. 7, assistant overseers were first established (a). The officer so appointed is not a

(a) Which enacts—"That it shall be lawful for the inhabitants of any parish in vestry assembled, to nominate and elect any discrete person or persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by them executed and performed, and to fix such yearly salary for the execution of the said office, as shall by such inhabitants in vestry be thought fit; and it shall be lawful for any two of his Majesty's Justices of the Peace, and they are hereby empowered, by warrant, under their hands and seals, to appoint any person or persons who shall be so nominated and elected to be assistant overseer or overseers of the poor for such purposes, and with such salary as shall have been fixed by the inhabitants in vestry, and such salary shall be paid out of the money

raised for the relief of the poor, at such time and in such manner as shall have been agreed upon between the inhabitants in vestry and the respective persons to be appointed; and every person to be so appointed assistant overseer, shall be and he is hereby authorised and empowered to execute all such of the duties of the office of overseer of the poor, as shall in the warrant for his appointment be expressed, in like manner, and as fully to all intents and purposes, as the same may be executed by an ordinary overseer of the poor; and every person or persons so appointed, shall continue to be an assistant overseer of the poor, until he or they shall resign such office, or until his or their appointment shall be revoked by the inhabitants of the parish in vestry assembled, and no longer; and it shall be lawful for the inhabitants




churchwarden; so, neither is he an overseer, which means an overseer in an unqualified sense, a complete officer under the statute of *Eliz.*; for, where a word of distinct meaning occurs in the statute, it must be taken without qualification. An assistant overseer will not satisfy that definition. He is not an additional overseer, nor a deputy overseer, but a new and distinct officer. He need not be a substantial householder; he is not, in the first instance appointed by the magistrates; he is not compellable to take office; he acts under a contract with the vestry at a salary, which contract is subsequently ratified by the magistrates; the due performance of his duty is secured by bond; and in many other particulars he differs from a regular overseer. The only remaining term within which he can be included, is, a person authorised to take care of the poor. The duties of an assistant overseer are not specifically defined by law, but vary according to the special appointment of each officer respectively. The persons contemplated by these words are, guardians of the poor, chapelwardens, and persons who have authority to make rates; but an assistant overseer has no such power, and is not, therefore, within the act. But, admitting that he may be liable, as a person authorised to take care of the poor, the declaration should charge him in that character, and expressly aver that it was the duty of the defendant below, as assistant overseer,

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of any parish, upon the nomination and election by them of an assistant overseer or overseers, to require and take security for the faithful execution of his or their office by bond, with or without a surety or sureties, and in such penalty as they shall think fit; and every such bond shall be made to the church-


wardens and overseers of the poor, and may, on any breach of the condition thereof, be put in suit by and in the names of the churchwardens and overseers of the poor for the time being, by the direction of the vestry or select vestry, for the benefit of the parish, in the manner hereinafter provided."

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to produce the rate. In an action upon a statute, the plaintiff must aver every thing which is requisite to entitle him to an action. *Com. Dig. Action upon statute* (A. 3). And although, after verdict, every intendment must be made, yet, nothing can be presumed but what is expressly stated in the declaration, or what is necessarily implied from those facts which are stated. *Spiers v. Parker* (a). If, then, the possession of the rate, as assistant overseer, furnishes a necessary implication, that it was his duty to permit the plaintiff below to inspect it, the declaration is sufficient; but if there be any other possible purpose for which the rate might be in his possession, it is insufficient, and the plaintiff in error will be entitled to judgment. Now, there are many assignable causes for which he might have the rate in his possession. He might have it for the mere purpose of collecting the rate; or he might have a transitory possession, with a view merely to deposit it in the parish chest; or he might be entrusted with it for a specific purpose, excluding the duty of exhibiting it. The liability attaches upon the person having the legal custody, as distinguished from the mere possession, and the legal custody is subject to the direction of the vestry, by statute 59 *Geo. 3*, c. 69, s. 6. The circumstances from which the liability arises, must be expressly alleged. Upon this subject there are many cases to which it will be unnecessary to refer. Amongst others, in the case of *Short v. Pruin* (b) it was holden that, in an action against a farmer of the post-horse duties, under the statute 27 *Geo. 3*, c. 26, for neglect of duty, it was necessary to aver that he was the farmer appointed under and by virtue of that act. So, in *Max v. Roberts* (c), where the defendants being owners of a ship at Liverpool, bound on a voyage from thence to Waterford, the plaintiff shipped goods on board, to be

(a) Per *Buller, J.*, 1 T. R. 145. (b) 6 T. R. 163. (c) 12 East, 89.

carried upon the said voyage by the defendants, and to be delivered at Waterford to the plaintiff's assigns; and, thereupon, the plaintiff insured the goods at and from Liverpool to Waterford, and then averred that it was the duty of the defendants, as such owners, to cause the ship to proceed on the voyage from Liverpool to Waterford without deviation, and alleged a breach of such duty, by their causing the ship to deviate from the course of that voyage, after which she was lost with the goods, and the plaintiff, by reason of such deviation, lost his goods, and the benefit of his policy, &c.; it was holden, that the count could not be maintained, because no fact was alleged, from which the law could imply any duty in the defendants with respect to the goods. And in *Rex v. Everett (a)*, where an information stated that *H.* was a person employed in the service of the customs, and that it was his duty, as such person so employed, to seize certain goods; and that the defendant offered to bribe *H.* to violate his duty; the judgment was arrested, because, inasmuch as it was not the duty of every person employed by the customs to seize goods, and the count did not shew that *H.* was a person whose duty it was to arrest and detain such goods, it was bad.

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*Campbell*, for the defendant in error. If an assistant overseer were not liable to the penalty for not producing the rate, the statute would be repealed, *pro tanto*, in every case in which the rate was in the possession of the assistant overseer; for, if he be unpunishable for refusing to produce it, and the overseer be excused because the rate is not in his possession, the parishioner would be without remedy. An assistant overseer, if appointed with all the powers of the principal officer, is within the provisions of the statute 17 Geo. 2. The office is the

(a) *Ante*, Vol. I. 288; 2 M. & R. 35; 8 B. & C. 114.

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same, and the only difference is, the mode of appointment; an assistant overseer is a species merely within the genus overseer. Were it otherwise, the parish would be without redress; for he may be invested with all the powers of the principal officer without incurring his liability. The question, therefore, is, whether the declaration sufficiently shews that it was his duty to produce the rate. If the facts be alleged from which the duty originates, the duty itself need not be averred. Upon that principle, the case of *The King v. Everett* was decided. Now, the statute requires, that the rate should be produced; and in order to originate the duty, it is only necessary to shew that he had possession of the rate, and that the production was demanded at a reasonable time. It is said, however, that he might have had possession of the rate for a particular purpose merely, as, for instance, to collect the rates; and that he cannot be bound to produce it to all who may require the production. Under such circumstances, he would not be bound to produce it, because the demand would not be reasonable. He could not have the rate in his possession, except as overseer, and if the production were demanded at a reasonable time, he was bound to produce it. In *Max v. Roberts*, the facts were not stated, from which the duty arose. The principle to be extracted from the case of *The King v. Everett* is, that an allegation of duty is insufficient, unless the facts be stated, from which that duty arises; but if the facts be stated, the allegation of duty is immaterial. That case is, therefore, an authority for the defendant in error; for here, although there is no allegation of duty, the facts are stated, from which that duty may be inferred.

*Ludlow*, Serjt., in reply. The argument for the plaintiff in error would not tend to abrogate or evade the statute;

for, although the assistant overseer may not be liable by reason of his possession merely, the party who had the legal custody would be bound to produce the rate. The argument for the defendant in error proceeds upon the fallacy of confounding the mere possession with the legal custody, upon which alone the liability attaches.

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TINDAL, C. J.—In the argument of this case, two objections have been taken. The *first*, that an assistant overseer is not within the statute 17 Geo. 2, which imposes the penalty; and the *second*, assuming, in point of law, that he is within the statute, that he is not liable upon this record. After hearing the arguments, we think that neither of these objections can prevail, and that the judgment ought to be affirmed.

With respect to the *first* objection, the words of the statute 17 Geo. 2, c. 3, s. 3, are:—That, if any churchwarden or overseer of the poor, or other person authorised as aforesaid (that is, authorised to take care of the poor), shall not permit any inhabitant or parishioner to inspect the said rates, or shall refuse or neglect to give copies thereof as aforesaid, such churchwarden or overseer, or other person authorised as aforesaid, for every such offence shall forfeit and pay to the party aggrieved the sum of 20*l.*, to be sued for and recovered by action of debt, bill, plaint, or information in any of his Majesty's Courts of Record. It is said, that an assistant overseer does not come within either of these descriptions. It may be admitted that he is not a churchwarden nor an overseer; but, whether he be or be not a person authorised to take care of the poor, will depend upon the nature of his appointment. The statute 59 Geo. 3, c. 12, s. 7, under which he is appointed, enacts, that it shall be lawful for the inhabitants of any parish, in vestry assembled, to nominate and elect any discreet person or

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persons to be assistant overseer or overseers of the poor of such parish, and to determine and specify the duties to be by him or them executed and performed, and to fix such yearly salary for the execution of the said office as shall, by such inhabitants in vestry, be thought fit; and it shall be lawful for any two of his Majesty's justices of the peace, and they are hereby empowered, by warrant under their hands and seals, to appoint any person or persons, who shall be so nominated and elected, to be assistant overseer or overseers of the poor for such purposes and with such salary as shall have been fixed by the inhabitants in vestry. It must, therefore, depend upon the words of his appointment whether an assistant overseer be or be not a person authorised to take care of the poor; and if they are large enough to embrace all the authority of the superior officer, then, undoubtedly, he would be, within the meaning of the statute, a person authorised to take care of the poor, and liable to the penalty. It would indeed be a narrow construction of this statute to confine its operation to such officers only as were then in existence. It is true, that it could not at the time be intended to apply to assistant overseers, because such officers were not then known; but the legislature having created an officer, who does come within the description of the statute, it would be a narrow construction of an act, which is not merely penal but remedial, to say that such an officer was not within its operation.

But, assuming that an assistant overseer is within the terms of the act, still it is said, that, upon this record, the defendant is not brought within its operation. Undoubtedly, if this objection had been taken by way of demurrer, it must have prevailed; but, upon the present occasion, the question is, whether, after verdict, it is not to be intended that the defendant does come within the

description in the statute. I have already adverted to the statute under which an assistant overseer is appointed, and by which it appears that his duty is defined by the warrant by which he is appointed. Now, the declaration contains an allegation that the defendant is an assistant overseer, which allegation could not be proved, except by the production of the appointment, or by giving secondary evidence of its contents. Without adverting to any other allegation, the judge who had the warrant of appointment before him, would direct the jury that the case was not within the statute, unless by the appointment the defendant had authority to take care of the poor. After verdict we must, therefore, assume that the authority of the defendant was such as would satisfy the description in the act. But the declaration further alleges, that the defendant was requested to produce the rate, and had it in his possession as such assistant overseer. At all events, therefore, even if, by his appointment, he had no general authority to take care of the poor, he had a limited authority, part of which was, to have the custody of the rate books ; because we cannot, after verdict, intend that he had the book in his possession, otherwise than in the execution of his duty. The question, therefore, is, whether, after verdict, it must not be intended that he was authorised to take care of the poor, or that it was his duty to have the custody and possession of these books : and in either view of this case the declaration would be sufficient. If this declaration had contained an allegation that the defendant had authority to take care of the poor, no doubt could exist ; but as it is doubtful whether he had that or a more limited power, and as the judge must have directed the jury to find for the defendant, unless, by his appointment, he came within the description of the statute, we must, after verdict, intend that he had either a general authority to

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take care of the poor, or a limited authority to have the rightful custody of the books. The case of *The King v. Everett* is distinguishable from this. By the statute upon which that information was founded, three classes of persons were authorised to seize goods, and the officer in that case came within neither of those classes. The answer to that case is, that the defendant was there charged with a crime, and in a criminal case the same intendment ought not to be made.

It appears to us, that on neither of the grounds should the judgment be reversed; but, on the contrary, that it should be

Affirmed.

The defendant set a spring-gun in his garden, (which was at some distance from his dwelling), of which fact he gave no notice. The plaintiff entered the garden in pursuit of a strayed fowl, and, coming in contact with one of the wires, was wounded by the discharge of the gun:—Held, that the plaintiff was entitled to recover damages for the injury, in an action on the case.

BIRD, an infant, by BIRD his next friend, v. HOLBROOK. (a)

THIS was an action on the case brought by the plaintiff against the defendant, to recover compensation in damages for an injury inflicted on the former by the discharge of a spring-gun set in the defendant's ground. The first count of the declaration alleged, that the defendant had placed in a certain garden of the defendant a certain instrument called a spring-gun, loaded with gun-powder and shot, with certain wires communicating with the lock of the said gun, by the treading upon which the gun could and might be let off; by means whereof the persons against whom the same should be discharged, might and could be much hurt, maimed, and wounded: and thereupon, it became the duty of the defendant, after he had so placed the said gun, not to suffer it to remain so loaded, without giving notice or warning, to prevent persons having occasion to enter into the said

(a) This, and the four following cases, are taken, by permission, from Messrs. Moore and Payne's Reports.



garden from treading upon the wire, in ignorance that the same was so set, and thereby letting off the gun, and being injured by the discharge thereof. Yet the defendant, not regarding his duty in that behalf, wrongfully, wilfully, and negligently, suffered the gun to remain in his garden so loaded and set, without giving any such notice or warning whatever; by means whereof the plaintiff, having occasion to enter into the garden, and not having any notice, warning or knowledge, or any means of knowledge, that any spring-gun was set in the garden, trod upon the wire attached to the lock of the gun; by means whereof it was let off and discharged, and the shot discharged therefrom were driven against the plaintiff, and one of his legs was maimed; and the plaintiff was otherwise injured, and became disordered, and so continued for a long time: by means whereof he suffered great pain, and expended a large sum of money in his cure.

The second count alleged, that it was the duty of the defendant not to allow the spring-gun to remain loaded in the day-time, without notice to prevent persons from treading upon the wire, from ignorance that it was set.

The third count described the spring-gun as a certain dangerous engine, made for the purpose, and with the intent, to lacerate, maim, and wound persons; and alleged that it was the duty of the defendant not to suffer the spring-gun to remain in the garden, without using due and proper and reasonable means or care to prevent such persons as might enter into or be in the garden from ignorantly and unwittingly treading on the wire communicating with the lock of the gun; and that the defendant did not take due and proper and reasonable care to prevent persons who might enter into or be in the garden from ignorantly and unwittingly treading upon the wire of the gun, and thereby causing it to be

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let off; but that the defendant neglected and wholly refused so to do, and, on the contrary, contriving and intending to injure the plaintiff, wrongfully and injuriously permitted the gun to remain in his garden so loaded and set with the wire, by means of which it might be let off and discharged, without any notice or warning: by means whereof, the plaintiff, not being able to perceive a certain concealed wire, and not having any notice or knowledge or means of notice or knowledge thereof, trod upon the said last-mentioned wire, and the gun was thereby let off.

The fourth count charged the defendant with having set, upon certain other ground of the defendant, a spring-gun, made with intent to lacerate, maim, and wound persons, being then and there loaded with gun-powder and shot, and set with concealed wires: and that thereupon it became the duty of the defendant not to permit the gun to remain on the ground without taking due, proper, and reasonable means and care to prevent any person from ignorantly and unwittingly treading upon the wire, and causing it to be let off.

The fifth count charged, that the wires were concealed and imperceptible; that the defendant had taken no means or precaution whatsoever to prevent persons from treading on them through ignorance that they were so set; and that the defendant wrongfully permitted the plaintiff, in entering into and proceeding in the said last-mentioned garden, to tread upon the said wire, so concealed and imperceptible and unknown to the plaintiff.

The sixth count charged the defendant with setting a gun upon certain other land of the defendant, and alleged the breach of duty, in having taken no means or precaution whatever to prevent persons from treading on the wire, and having wrongfully and injuriously permitted

the plaintiff, in entering into and proceeding in the said last-mentioned garden, to tread upon the wire.

At the trial, before the Lord Chief Justice, at the Bristol Assizes, in the year 1825, a verdict was taken for the plaintiff, by consent, damages 50*l.*, subject to a case reserved, with liberty to either party to turn it into a special verdict. The facts of the case were as follows:—

Before and at the time of the plaintiff's sustaining the injury complained of, the defendant rented and occupied a walled garden, in the parish of St. Philip and St. James, in the county of Gloucester, in which he grew valuable flower-roots, and particularly tulips of the choicest and most expensive description.

The garden was at the distance of nearly a mile from the defendant's dwelling-house, and above one hundred yards from the road, and was in a place called the Nursery. In it there was a summer-house, consisting of a single room, in which the defendant and his wife, some considerable time before, had slept, and intended in a few days after the accident again to have slept, for the greater protection of their property. The garden, which was rectangular, was surrounded with a wall, by which it was separated, on the south, from a foot-way up to some houses; on the east and west from other gardens; and, on the north, from a field which had no path through it, and was itself fenced against the highway, at a considerable distance from the garden, by a wall.

On the north side of the garden, the wall adjoining the field was seven or eight feet high: the other walls were somewhat lower. The garden was entered by a door in the wall. The defendant had been, shortly before the accident, robbed of flowers and roots from his garden to the value of 20*l.* and upwards; in consequence of which, for the protection of his property, with the

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assistance of another man, he placed in the garden a spring-gun, the wires connected with which were made to pass from the door-way of the summer-house to some tulip-beds, at the height of about fifteen inches from the ground, and across three or four of the garden paths, which wires were visible from all parts of the garden wall; but it was admitted by the defendant, that the plaintiff had not seen them, and that he had no notice of the spring-gun and the wires being there, and that the plaintiff had gone into the garden for an innocent purpose, to get out a pea-fowl that had strayed.

A witness, to whom the defendant mentioned the fact of his having been robbed, and of his having set a spring-gun, proved that he had asked the defendant if he had put up a notice of such gun being set; to which the defendant answered, that he did not conceive that there was any law to oblige him to do so. And the defendant desired such person not to mention to any one that the gun was set, lest the villain should not be detected. The defendant stated to the same person that the garden was very secure, and that he and his wife were going to sleep in the summer-house in a few days. No notice was given of the spring-gun being placed in the garden; and, before the accident in question occurred, another person, to whom the defendant mentioned the fact of his garden having been robbed of roots to the value of 20*l.*, and to whom he stated his intention of setting a spring-gun, proved, that he had told the defendant that he considered it proper that a board should be put up, but that he could not give an opinion as to the law, and the witness did not recollect what the defendant had said in answer.

On the 21st March, between the hours of six and seven in the afternoon, it being then light, a pea-hen belonging to a Mr. *Morgan*, who occupied a house in the

neighbourhood, had escaped, and, after flying across the field above-mentioned, alighted in the defendant's garden. A female servant of the owner of the bird was in pursuit of it, and the plaintiff, a boy of the age of nineteen years, seeing her in distress from the fear of losing the bird, said he would go after it for her. He accordingly got upon the wall at the back of the garden next to the field, and, having called out two or three times, to ascertain whether any person was in the garden, and waiting a short space of time without receiving any answer, jumped down into the garden. The bird took shelter near the summer-house, and the boy's foot coming in contact with one of the wires, close to the spot where the gun was set, it was thereby discharged, and a great portion of its contents, consisting of large swan shot, was lodged in and about his knee-joint and caused a severe wound.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover: if so, the verdict to stand; otherwise, a nonsuit to be entered.

*Wilde*, Serjt. for the plaintiff. The plaintiff is entitled to recover as well on the facts stated in the case as on the general principles of law. No individual has a right to protect his property by administering punishment by way of example. The infliction of punishment is for the law. If the object of a party in placing a spring-gun be not the prevention of a trespass or felony, but the punishment of an offence when committed, it is an illegal act. No person can intentionally produce an injury to another in his absence, which, if present, he could not be justified in doing; and if a man place a dangerous machine or instrument for the purpose of protecting his property, knowing how it will operate in his absence, he is equally answerable for a consequent injury as though he were present and was the directing or moving agent.

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No one, even to prevent a felony, can inflict a greater injury than is necessary for the purpose of apprehending the offender, in order that he may be prosecuted according to law; and extreme violence cannot be resorted to in the first instance. A mere trespasser cannot be apprehended; at all events, he cannot be exposed to the infliction of wounds which may produce death; and an individual, by withholding his presence, cannot increase the danger of the party trespassing. The facts of this case distinguish it altogether from those of *Deane v. Clayton* (a), and *Ilott v. Wilkes* (b). Lord Chief Justice Dallas, in *Deane v. Clayton*, said (c): "One other point only remains before I come to the question itself, which is, how far the present decision will apply to measures that may, by direct operation or necessary consequence, affect human life. As to this, I will only observe, such cases seem to me to depend on different grounds, the law distinguishing, to many and most essential purposes, between property and the life of man; and to the facts of this case only my present opinion is intended to apply:" and Mr. Justice Burrough said (d): "Intention to cause the injury is not the governing feature in cases of (what is ordinarily called) nuisance, although it may, in many cases of the kind, be an important fact. If the thing be done, and the injury to another's rights be the consequence, the law will, if necessary, supply the intention. But I conceive that express intention may make that act in some cases unlawful in the beginning." In *Ilott v. Wilkes*, Lord Chief Justice Abbott said (e): "We are not called upon in this case to decide the general question, whether a trespasser sustaining an injury from a latent engine of mischief, placed in a wood or grounds

(a) 2 Marsh. 577; S. C. 1 B. Moore, 230, 7 Taunt. 489.

(b) 3 Barn. & Ald. 304.

(c) 1 B. Moore, 230.

(d) 1 B. Moore, 211.

(e) 3 Barn. & Ald. 308.

where he had no reason to apprehend personal danger, may or may not maintain an action." Here the defendant did not place the gun to operate by way of terror or caution, but expressly to inflict an injury, which it was not competent to him by law to inflict; and although his ultimate object might be to protect his property, yet he did all in his power to conceal the fact of the gun being set. His primary intent, however, was to injure, as he desired a person to whom he spoke of it not to mention to any one that the gun was set, lest the villain should not be detected. His object, therefore, was not only to detect but to punish. Humanity requires that persons should be put on their guard; and notice should have been given that the gun was set in the garden, particularly as it was merely placed there to protect property, and not persons. The plaintiff had no reason to apprehend personal danger; nor was there an appearance of any thing calculated to arouse caution or to create alarm. The gun offered no impediment or resistance to the commission of the trespass; and the plaintiff might have been in the act of retiring before it was discharged. In *Ilott v. Wilkes*, Mr. Justice *Holroyd* said (a): "If, indeed, a party who had no notice, had gone into the grounds, although he would be a trespasser, the act of firing off the gun by treading accidentally on the wires would not, in consequence of those wires being latent, be considered his own act; but he would be a mere instrument of producing that which resulted from a prior act done by another." Here it is quite clear that the plaintiff was a mere trespasser. His intent in entering the garden was innocent; and even had it been otherwise, he could at most only have been guilty of a misdemeanor under the statute 43 *Eliz. c. 7*. Besides, the gun was set in the day-time; and a party cannot be jus-

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(a) 3 Barn. & Ald. 315.

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tified in placing an instrument of death in his grounds, for the mere purpose of preventing a trespass on his property. If the defendant had been in the garden at the time the plaintiff entered, he would have been bound to caution him; and it therefore follows that, being absent, he should have given some notice that the gun was set. Lord Chief Justice *Best*, in *Ilott v. Wilkes*, said (a): "Humanity requires that the fullest notice possible should be given, and the law of England will not sanction what is inconsistent with humanity." Again, said his Lordship (b): "The prevention of intrusion upon property is a right essential to it; and every proprietor is allowed to use the force that is *absolutely* necessary to vindicate it. If he uses more force than is *absolutely* necessary, he renders himself responsible for all the consequences of the excess." Lord *Coke*, in his Second Institute (c), lays down a general principle, and takes a distinction between the defence of the person and the defence of property, thus: "There is also another diversity between an appeal of mayhem, or an action of trespass for wounding, or mannas of life and member; and an action of trespass of assault and battery for a man in defence, or for the preservation, of his possession of lands or goods; for, in that case, he may justify an assault and battery; but he cannot justify either mayheming, or wounding, or mannas of life and member, and so note a diversity between the defence of his person and the defence of his possession or goods." In *East's Pleas of the Crown* (d) it is said, that, to justify homicide, or killing, "there must be a *felony* intended; for if one come to beat another, or to take his goods, merely as a trespasser, though the owner may justify the beating of him so far as to make him desist, yet if he kill him it is man-

(a) 3 Barn. &amp; Ald. 319.

(c) Page 316.

(b) Id. 317.

(d) Vol. i., 272.



slaughter : but, if the other had come to rob him, or take his goods as a felon, and were killed in the attempt, it would be justifiable in self-defence." "But (a), where the trespass is barely against the property of another, the law does not admit the force of the provocation sufficient to warrant the owner in making use of any deadly or dangerous weapon. As if, upon sight of one breaking his hedges, the owner take up an hedge-stake, and knock him on the head and kill him, this would be murder; because it was an act of violence much beyond the proportion of provocation. And still more, where such or the like violence is used after the party has desisted from the trespass. But, if the beating were with an instrument or in a manner not likely to kill, it would only amount to manslaughter: and it is even lawful to exert such force against a trespasser, who comes without any colour to take the goods of another, as is necessary to make him desist;" and *Regina v. Mawgridge* (b) is referred to in support of that position. In Hale's Pleas of the Crown (c), it is laid down, that, "if A. comes into the wood of B., and pulls his hedges or cuts his wood, and B. beats him, whereof he dies, this is manslaughter; because, though it was not lawful for A. to cut the wood, it was not lawful for B. to beat him, but, either to bring him to a justice of peace, or punish him otherwise according to law." Again (d), "now, concerning felonies, as there is a difference between them and trespasses, so there is a difference among themselves in relation to the point of se defendendo. If a man comes to take my goods as a trespasser, I may justify the beating of him in defence of my goods; but if I kill him, it is manslaughter; but if a man comes to rob me, or take my goods as a felon, and in my resistance of his attempt I kill him, it is

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(a) East's S. C. vol. i., 238.

(c) Vol. i., 473.

(b) 1 Kelynge, 132.

(d) Id. 486.

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me defendendo at least, and in some cases not so much." It therefore follows, and may be laid down as a general principle, that, where a party, as a trespasser, offers a degree of resistance in the first instance, a man may exercise a necessary degree of force in order to make him desist; but such force must be progressive, according to the conduct or obstinacy of the offender; and even if a party had been guilty of the highest offence that could have been committed, in a case of this nature, viz., the stealing of roots in the garden, the defendant would not have been justified in using an instrument of death, even had he been present; and, as Lord Chief Justice *Dallas* said, in *Deane v. Clayton* (a), "that which it is unlawful to do by direct means, it is equally unlawful to do by indirect means." "Is it illegal," asked his Lordship, "to place spikes or glass upon a wall?—and, if a party climbing over be thereby wounded or cut, can he bring an action? And yet if I were to see a trespasser coming down my area, or getting over the garden wall, I could not drive the spike into his hand, or cut him with the glass." In such a case, spikes or glass would offer a resistance at the moment of entering, and might be seen. Here, however, the gun was not visible; and if the defendant had been in the garden, and had discharged it at the plaintiff and killed him, he would have been guilty of the crime of murder. The act of concealment was contrary to humanity and to the common feelings of nature. A party trespassing, or even entering a garden with a felonious intent, should at all events have warning. There is a manifest distinction between the case of a spring-gun set for the protection of a man's house or person from nightly intruders, against whom he might be unable to offer any other effectual resistance, and that of one placed for the mere protection of property. A

(a) 1 B. Moore, 233.

party must rely on the laws of his country for protection, and cannot be permitted to purchase his security by inflicting bodily injury on an imprudent or unwary transgressor or trespasser; nor can a man be allowed to do that which is inconsistent with humanity, or to do that indirectly which it is not lawful for him to do directly. On these grounds the plaintiff is entitled to judgment.

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*Merevether*, Serjt., contra. It has been contended, that the plaintiff is entitled to recover on the facts stated in this case, as well as on general principles of law. Two propositions, however, may be deduced from the latter, which will constitute a good defence to this action; first, the defendant's right to adopt measures for the protection of his property during his absence; and secondly, that a wrong-doer cannot be entitled to recover compensation for any injury occasioned by his own unlawful act. Although it has been said, that a party is not justified in inflicting punishment on another, as that is the province of the law; and that a man cannot do that indirectly, which he is not justified in doing directly; yet, it is quite clear, that it is lawful to resist a trespass. The defendant did not intend to punish a party entering his garden; but to protect his property there by the detection of the offender. His object, therefore, was to prevent, rather than to punish. It has been assumed, in the argument for the plaintiff, that the defendant was a wrong-doer, as he had voluntarily absented himself from the garden after the gun was set; and that, if he had been present, he would not have been justified in discharging it at the plaintiff. The absence of the defendant might have been merely temporary, or in the course of his necessary avocations; and, as the garden was at the distance of nearly a mile from his house, he was justified in endeavouring to protect his

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property therein during such absence, by means which he would not have been warranted in resorting to had he been present. An inclosed or walled garden cannot be compared to a wood or open field; and, as the defendant's property in the garden had been previously plundered, he was induced to resort to means to protect it in future, by the detection of the party offending. In *Deane v. Clayton*, Lord Chief Justice *Gibbs* was clearly of opinion that a person had a right to protect his property against a trespasser or aggressor, for he said (a): "As far at least as civil rights are concerned, every man may guard his own land from encroachments, by any means he pleases, provided he does not thereby invade or interfere with the legal rights of others. It is the *rights* of others, and not their security against the consequences of wrongs, that I am bound to regard." In *Ilott v. Wilkes*, Mr. Justice *Bayley* said (b): "It has been said that these guns were wrongfully and unlawfully placed in the wood. Now, let us inquire whether it was unlawful or not. One of the tests of trying that question is this,—does the law punish a man for the mere act of putting these instruments upon his own premises?—is he indictable for it?—for that is the criterion by which we are to judge of the legality of this act. If it cannot be shewn that it is an unlawful act to set these spring-guns, it seems to me that the defendant was at liberty to do it." Here the plaintiff was clearly committing a trespass at the time he received the injury. He was, therefore, a wrong-doer, and it is a well-known maxim, that *commodum ex injuriâ suâ nemo habere debet* (c); so it is an established principle of law, that *jus ex injuriâ non oritur*. But it has been said, that, if the defendant had been present, he could not have used force without

(a) 1 B. Moore, 241.

(c) Jenkins's Cent. 161.

(b) 3 Barn. &amp; Ald. 311.

previous notice; that only necessary force can be used to prevent a trespass or repel a trespasser; and that, in the case of an illegal entry, the trespasser must be requested to depart before violence can be resorted to; and even then, that a wounding could not be justified. A distinction has been taken between a felony and a trespass. In the latter case, a party present, who sees an act of trespass committed on his property, may repress it and oppose the trespasser with force, provided he do not go beyond what the occasion requires, as he cannot take the law into his own hands. But here, the defendant's property was at a distance from his dwelling, and he had a right to secure it in his absence against a party coming to invade it. Although it has been said that humanity required some notice to be given that the gun was set, yet there is no decision which goes the length of shewing that such notice is necessary. In *Ilott v. Wilkes* the party trespassing knew that there were spring-guns in the wood; but that case did not decide that the defendant was bound to give notice, and Mr. Justice *Holroyd* there said (a): "A party who enters on a place as a trespasser, with full knowledge of the danger, is himself the cause of the mischief that ensues, and falls within the principle of law, *volenti non fit injuria*. If, indeed, the defendant had been present, and had seen a trespasser enter, and had the means of preventing the injury, and had not done all in his power to prevent it, unquestionably it might have been considered as proceeding from his own act; but, in the present case, he was absent, and had not the means of averting the mischief; and, therefore, the maxim of law, that a man cannot do that indirectly which he cannot do directly, is not applicable." Although it has been usual to give notice that spring-guns and man-traps are set in grounds,

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(a) 3 Barn. &amp; Ald. 314, 316.

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yet it is *ex majori cautela*. In *Brock v. Copeland* (a), the defendant, a carpenter, kept a dog for the protection of his yard, and for that purpose let it loose at night, and his foreman having gone into the yard after it was shut up for the night was bitten; and Lord *Kenyon* said, "that every man had a right to keep a dog for the protection of his yard or house; that the dog had been properly let loose, and the injury had arisen from the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up." There the dog was not let loose for the purpose of protecting the yard from persons entering to commit felony, but from trespassers also. There too the party injured was not a trespasser, but the defendant's foreman; and yet Lord *Kenyon* ruled that the action would not lie. If broken glass be placed on a wall, or spikes behind a carriage, for the protection of property, a party thereby receiving an injury, although by night, and in the absence of notice, could not recover compensation in damages for such injury from the person who had caused the glass or spikes to be so placed. The plaintiff has here alleged, in the first count of his declaration, that it was the duty of the defendant to have given notice that the gun was set in the garden. It must be admitted, that, if it were uninclosed, or if persons were at liberty to resort to it for innocent purposes, it would have been incumbent on him to exercise an ordinary degree of caution; but here the garden was surrounded by a high wall, and the plaintiff must have used force in getting over it. The wall itself was sufficient to operate as a notice, and to render a person entering a wilful intruder; and it is found as a fact in the case, that the wires communicating with the gun were visible from all parts of the garden wall. That, therefore, was equivalent to actual notice. In *Hott v.*

(a) 1 Esp. Rep. 203.

*Wilkes*, the trespasser did not know the particular place in the wood where the guns were placed; and here the gun was only intended to operate during the night. Since the plaintiff sustained the injury, to recover compensation for which the present action is brought, the stat. 7 & 8 *Geo.* 4, c. 18, was passed, by which it is enacted, that, after its passing, persons setting spring-guns shall be guilty of a misdemeanor, except they be set for the protection of dwelling-houses from sunset to sunrise. It must be, therefore, inferred, that the legislature thought the setting such instruments to be legal before that statute was passed. In the case referred to by Lord *Kenyon*, in *Brock v. Copeland*, where a party kept a mischievous bull, there was a right of way over the close in which it was kept; and, therefore, it was held that such party was answerable for any injury a person passing through the close might sustain from it. The principle, *sic utere tuo ut alienum non lædas*, shews that a man is not to make any use of his property he pleases, but is so to use it as not thereby to injure or annoy another in the enjoyment of his *rights* or *property*. That, however, does not apply to the case of a wrong-doer, or a party exercising an unlawful or unjustifiable claim. The gun in this case was not set for the prevention of a mere ordinary trespass, as it required no mean effort to get over the wall. In *Blythe v. Topham* (a), the defendant dug pits on a common, and the plaintiff's mare straying thereon fell into one of them and died; and it was held, that the action could not be supported, because it did not appear that the mare had any right to be on the common. That case is far stronger than the present, as there there was no notice, nor was there any wall round the pit into which the mare fell, neither was it in inclosed ground, as in this case, to enter which must be considered as a wil-

(a) Cro. Jac. 158; S. C. 1 Bull. N. P. 78.

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ful trespass. In *Deane v. Clayton*, Lord Chief Justice *Dallas* lays down the true distinction, as to the presence or absence of a party, in a case of this nature. "Presence," said his Lordship (a), "in its very nature, is more or less protection; absence is abandonment and dereliction for the time. Presence may supply means, and limit what it supplies; but if, during absence, property can only be protected by such means as may be resorted to in the case of presence, all property lying open to inroad can have no protection, at least by any act of the party himself; for, to say that he can only be protected, when absent, by such means as he could use if present, is a contradiction in the nature of things." On the ground, therefore, that the defendant was not prohibited by law from setting his gun in his garden to protect his property therein during his absence, and as the plaintiff was clearly a trespasser, he cannot be entitled to recover in this action, the injury he sustained having arisen from his own unlawful act.

*Wilde*, Serjt., in reply. Admitting that the defendant had a qualified right to set the gun in his garden, still he is liable in a civil action for an injury sustained by one who had no previous notice that it was placed there. In *Ilott v. Wilkes*, Mr. Justice *Bayley* founded his opinion on the circumstance that the plaintiff had notice that there were spring-guns in the wood; for, said his lordship (b), "Although it may be lawful to put these instruments on a man's own ground, yet, as they are calculated to produce great bodily injury to innocent persons, for many trespassers are comparatively innocent (which is the case here), it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger. The case of a man keeping on his own pre-

(a) 1 B. Moore, 233.

(b) 3 Barn. &amp; Ald. 312.



mises a furious dog or bull is to a certain degree analogous to this. Suppose such a person were to give a notice, that in his premises there is a furious bull, and that it is dangerous for any person to enter, and a wrong-doer, who had read this notice, enters, and the bull attacks him, it is clear that he could maintain no action for the consequences of his own act." And Mr. Justice *Holroyd* said (a): "The mere act of placing spring-guns in a man's own ground is not of itself unlawful. It is not an indictable offence; nor will it subject a party to an action, unless some injurious consequence result from it. If any such consequences result, it may perhaps form the subject of an action:" and his Lordship afterwards founded his judgment on the fact, that the plaintiff had express notice that the guns were set in the wood. Although a party may not be liable to an indictment for setting spring-guns in his inclosed field, yet he is liable to an action at the suit of a person who receives an injury therefrom, provided he has given no notice that they were placed there. The maxim, *sic utere tuo ut alienum non lædas* applies most forcibly to this case. A man may perhaps dig a pit on his own land and leave it unfenced, and if the cattle of another fall in, he may not be liable for the injury; yet he is not justified in secretly placing a deadly weapon on his land to wound or kill a trespasser. The object of the defendant was, that the gun should do a serious mischief to a party entering his garden; and the moment the consequence followed, the injured person had a right of action. In *Brock v. Copeland*, the dog was let loose in a yard attached to the defendant's dwelling-house to protect the property from being feloniously taken. Although, however, the defendant may have had a right to set a spring-gun in his garden, yet he was not justified in suppressing the notice

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(a) 3 Barn. &amp; Ald. 314.

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of its being placed there ; and he not only expressly withheld notice, but he assigned as a reason that he did so, lest the villain should not be detected. It is evident, therefore, that the gun was set, not for the purpose of preventing a trespass, but of inflicting an injury on the party trespassing.

BEST, C. J.—I am of opinion that this action is maintainable. If any thing which fell from me in *Ilott v. Wilkes* were at variance with my present opinion, I should not hesitate to retract it ; but the ground on which the three other learned Judges of the Court of King's Bench proceeded in that case appears to me to be decisive of the present. I put the question distinctly on the ground that the plaintiff had notice that the guns were set. On that ground only the Court held that the action was maintainable ; and I said : “ It cannot be unlawful to set spring-guns in an inclosed field, at a distance from any road, giving *such notice* that they are set as to render it in the highest degree probable that all persons in the neighbourhood must know that they are so set.” Lord Chief Justice *Abbott* there said (a) : “ I believe that many persons who cause engines of this description to be placed in their grounds do not do so with the intention of injuring any one, but really believe that the *notices they give* of such engines being there will prevent any injury from occurring, and that no person, who sees the notice, will be weak and foolish enough to expose himself to the perilous consequences likely to ensue from his trespass. In this case, it is found by the jury that the plaintiff actually knew that spring-guns were set in this wood. Considering the present action merely on the ground of *notice*, and leaving untouched the general question as to the liability incurred by placing such engines

(a) 3 Barn & Ald. 309.

as these where *no notice* is brought home to the party injured, I am of opinion that this action cannot be maintained." And Mr. Justice *Bayley* said (a): "This is a case in which the plaintiff *had notice* that there were spring-guns in the wood. It is not necessary to give notice to the public that guns are placed in such particular spots in such particular fields; for that would deprive the property of the intended protection. It is sufficient for a party generally to say, "There are spring-guns in this wood;" and if another then takes upon himself to go into the wood, knowing that he is in the hazard of meeting with the injury which the guns are calculated to produce, it seems to me that he does it at his peril, and must take the consequences of his own act. The maxim of law *volenti non fit injuria* applies, for he voluntarily exposes himself to the mischief which has happened. He is *told*, that, if he goes into the wood, he will run a particular risk, for that in those grounds there are spring-guns. The declaration assumes the law to be, not that the mere act of placing these guns in a man's own ground is illegal, and punishable by indictment, but that a party doing that act may be liable to an action, provided he does not take the due and proper means, by giving notice, to prevent the injury which those engines are calculated to produce." That appears to me to be decisive of the present case. The language of Mr. Justice *Holroyd* is still stronger. He said (b): "I am of opinion that this action is not maintainable, on the ground that the plaintiff *had notice* that the spring-guns were placed in the wood in question. The plaintiff entered the wood with *full notice* that those engines were placed there, and with the knowledge, therefore, that the danger was unavoidable. So far as he was concerned, the cause of the mischief could not be considered as latent;

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(a) 3 Barn &amp; Ald. 311.

(b) *Id.* 314, 316.

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and the act of letting off the gun, which was the consequence of his treading on the wire, must be considered wholly as his act, and not the act of the person who placed the gun there:" and I am reported to have said(a), "Humanity requires that *the fullest notice* possible should be given; and the law of *England* will not sanction what is inconsistent with humanity." It has been said, however, in the argument for the defendant, that the law does not compel a party to do many acts which humanity may require; but no person can do a thing which he is not sanctioned by law in doing; and if he do an illegal act by which an individual receives an injury, he is liable to make him a compensation in damages. There is a wide distinction between the omission and the commission of an act. If the law would not reach a party for the commission of an act which Christianity forbids, religion and morality, which have ever been considered its foundation, would no longer form part of our law. The weak are not to suffer by the oppression of the strong. The poor are protected and fed from the pockets of the rich; and although the laws for the relief and maintenance of the indigent and helpless are open to great abuses, still the principles on which they are founded must be approved of. They are calculated to afford permanent relief to a large body of the community, who must otherwise depend wholly on the precarious aid of charity for their support. I am of opinion, that, if a person set spring-guns in his grounds, without giving any notice, he is guilty of a most inhuman act, and that, if injurious consequences result, the injured party is entitled to redress by action. But there is another ground on which I am clearly of opinion that this action may be maintained. This is the strongest case that can possibly be put against the defendant. He did not set the gun with

(a) 3 Barn &amp; Ald. 319.

an intent to terrify or alarm ; for when he was asked if he had put up a notice, he answered, that he did not conceive there was any law to oblige him to do so, and desired that the fact of the gun being set might not be mentioned to any one, lest the villain should not be detected. He, therefore, intended that the gun should operate against whomsoever might chance to enter the garden, whether he were a mere trespasser, or a person entering with a felonious intent ; and that, on its contents being discharged, he might be deprived of life or limb. A trap might have been placed, by which a trespasser might have been secured ; but the defendant, in setting the gun, meditated the infliction of a serious mischief, which accordingly ensued ; and, as he resorted to a degree of violence which he was not justified in using for the purpose of preventing a mere trespass, he must be held liable. I am clearly of opinion, that, on these principles, and more particularly on the latter ground, this action is maintainable. I was at first somewhat perplexed by the late act of parliament. If it had been prohibitory only, there would have been great weight in the argument raised for the defendant ; because a new prohibitory law is the strongest possible evidence to shew that there was no previously existing law against the thing or act prohibited. But, on looking at the act, it will be found that it prohibits the setting of spring-guns, *either with or without notice*, and in the first section it is enacted and *declared*, that, from and after the passing of the act, if any person shall set a spring-gun or other engine, calculated to destroy human life or inflict grievous bodily harm, he shall be guilty of a misdemeanor. The statute, therefore, is declaratory as well as prohibitory, enacting, that, although notices may be given, the parties shall still be liable to a misdemeanor ; and virtually declaring that it was illegal to set spring-guns,

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without notice, before the act was passed : and the only exception from rendering a party liable to a prosecution for a misdemeanor, is, in cases where spring-guns are set from sunset to sunrise for the protection of dwelling-houses, and gins or traps set with the intent of destroying vermin. With respect to the case of *Brock v. Copeland*, Lord *Kenyon* there held, that every man has a right to keep a dog for the protection of his yard or house. But who was the party injured in that case ? The foreman of the defendant, a carpenter, who let loose the dog in his own yard, which he had an unquestionable right to do ; and if a trespasser had entered and had been bitten, he could have maintained no action. The foreman, from his being daily employed on the premises, knew that the dog was let loose at night ; and, as Lord *Kenyon* justly observed, it was the plaintiff's own fault, in incautiously going into the defendant's yard after it had been shut up ; but he might have gone there for a wrongful purpose, thinking, that, as the dog knew him, he would have been protected. With respect to the case of a ferocious bull, adverted to by Mr. Justice *Holroyd* in *Ilott v. Wilkes*, it is altogether distinguishable from the present ; for if a man cause such an animal to be placed in a field where there is a public footpath, he infringes on the rights of the public ; and if any injury be done by the bull to a person passing through the field, the owner is liable to an action, and bound to compensate the party injured. It is not necessary now to decide whether the owner of such an animal would be liable in case there were no footpath in the field. Although a man is not bound to destroy a vicious bull, yet he must keep him in a place where he is not likely to do mischief. The life of the animal is to be preserved, not for mischievous purposes, but for the renewal of his species. Here, however, the gun was set by the

defendant with a wicked intent and for the express purpose of doing mischief. With respect to the right of a party to place logs across a public path, or dig a ditch, as adverted to by Lord Chief Justice *Dallas*, in delivering his judgment in *Deane v. Clayton* (a), it must be observed, that his Lordship put it on these grounds, first, that the owner had a right to do what he pleased with his own land; and next, that the party sustaining the harm or damage had no right to be there. It is clear, that a party may drain his own land and divide it as he thinks fit. For these purposes he may cut ditches and raise fences; and if a person fall into one of such ditches, he must take the consequences, as the owner had a right to dig it for the improvement of his land. In the case of *Deane v. Clayton*, I was one of the counsel for the plaintiff, and, although the Court were there equally divided in opinion, I am strongly inclined to follow the doctrine there held by my brother *Park* and my brother *Burrough*. That case, however, is also very distinguishable from the present. There the plaintiff's dog was originally hunting in a woodland, where the plaintiff had a right to hunt and encourage the dog to find his game. The mischief was done to the dog in an adjoining woodland belonging to the defendant; and the only division between the two woodlands was a low bank or mound of earth, not being a sufficient fence to prevent dogs from passing from the one to the other. The manner in which the defendant and the owner of the woodland where the plaintiff was sporting occupied their respective properties, was evidence of a consent or understanding that the enjoyment should be mutual, and that the one might come and hunt in the wood of the other without being considered as a trespasser. And, as Mr. Justice *Park* there observed, "the animal only

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(a) 1 B. Moore, 234.

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followed his natural bent, and he having roused a hare, and pursued her, the plaintiff endeavoured, as much as in him lay, to prevent the dog from pursuing the hare, but was unable to do so." The dog was impelled by his natural instinct to pursue a hare started on land where the plaintiff had a right to sport, and there was no sufficient or even reasonable boundary to stop the animal in its progress. That case, therefore, appears to me to be entirely out of the question, whilst that of *Ilott v. Wilkes* is an authority in point. But we do not require any authority, for I ground my opinion in this case on the broad principle, that it is an inhuman act to set a spring-gun *in secrecy*, with intent to catch or detect a man by means which may wound and disable him, or perhaps even deprive him of life. That appears to me to be against all human laws; and the great objects of the law of this country are, to preserve morality, to enforce and inculcate the exercise of humanity, and to support and sustain religion. Under all the circumstances, therefore, I am of opinion, that the defendant in this case has been guilty of a criminal negligence, in not having given notice that the gun was set in his garden; and that his conduct was grossly and criminally inhuman, as, when warned of the danger that might accrue, he desired the party not to mention that the gun was set, lest the villain should not be detected.

PARK, J.—I also think that this action may be maintained. I still adhere to the opinion I expressed in the case of *Deane v. Clayton*, and with which my brother *Burrough* concurred; but I shall at present confine myself to the facts before the Court. As to whether the recent statute be a prohibitory or a declaratory act, I abstain from giving any opinion, as we are not now called on to decide that point. It certainly is a new law,



as it makes the setting of spring-guns criminal, whether they be set with or without notice, except for the protection of dwelling-houses; and then they may only be set from sunset to sunrise: so that, during some of the summer months, a party must rise from his bed, at two or three in the morning, to remove the wire from the lock. The ground on which I found my opinion is, that the defendant omitted to give any notice, and expressed a desire to conceal what he had done. In *Ilott v. Wilkes*, the whole Court, in delivering their opinions, proceeded on the ground that the plaintiff had notice that guns were set in the wood. Lord Chief Justice *Abbott* commenced his judgment by saying: "We are not called upon, in this case, to decide the general question, whether a trespasser sustaining an injury from a latent engine of mischief placed in a wood or in grounds where he had no reason to apprehend personal danger, may or may not maintain an action;" and he concluded by saying—"Considering the present action merely on the ground of notice, and leaving untouched the general question as to the liability incurred by placing such engines as these, where no notice is brought home to the party injured, I am of opinion that this action cannot be maintained." Although in *Deane v. Clayton* there was a notice, yet the trespasser was a dog, so that the notice could not be applicable to him. It has been said, however, that the law does not require a notice to be given; but in *Ilott v. Wilkes*, the Court of *King's Bench* thought a notice necessary; for Mr. Justice *Bayley* there said: "Although it may be lawful to put these instruments on a man's own ground, yet, as they are calculated to produce great bodily injury to innocent persons (for many trespassers are comparatively innocent), it is necessary to give as much notice to the public as you can, so as to put people on their guard against the danger:" and my

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Lord Chief Justice said, that humanity required that the *fullest notice* possible should be given. There is one case which is precisely in point, and which has not been adverted to, *viz.* that of *Jay v. Whitfield*, tried before the late Lord Chief Baron *Richards*, at *Westminster*, in 1817 (*a*). There the plaintiff, a boy, having entered the defendant's premises for the purpose of cutting a stick, was shot by a spring-gun, for which injury he recovered 120*l.* damages, and no attempt was afterwards made to set aside that verdict.

BURROUGH, J.—Where spring-guns, or other instruments of a like nature, are set in gardens or inclosed grounds, a notice is necessary to be given, according to the common understanding of mankind. Formerly it was the practice for the crier to give public notice of the fact of guns being set, on the usual market-days, in the town adjacent to the place where they were set. But, admitting that the defendant had a right to set the gun in his garden, he ought to have acted with the greatest care and caution; and, although he might have placed it there for the purpose of protecting his property by night, he should have removed the wires from the trigger during the day. Thieves who break into premises with a felonious intent generally select the night for that purpose. Here the plaintiff was a mere trespasser in the day-time, and yet he was exposed to the same degree of danger as if he had entered the garden at midnight and for the purpose of plunder. If the defendant had been present at the time the plaintiff entered the garden, he could not have taken him into custody or detained him. His only remedy was by an action for the trespass. He merely entered in pursuit of a bird which had escaped, which was an innocent

(a) 3 Barn. & Ald. 308, n.

purpose. I still adhere to the opinion I expressed in *Deane v. Clayton*, viz. that a person cannot justify doing that *indirectly* which he would not have been warranted in doing *directly*. There, the question was, whether it was lawful to set dog-spears in a wood, of which the defendant was the owner and occupier, and which adjoined a wood in the occupation of a Mr. *Townsend*, and was divided from it by a low bank or mound, and a shallow ditch, not being a sufficient fence to prevent dogs from passing from the one wood to the other. There were several public foot-paths through the defendant's wood, which were not fenced off; and, for the preservation of hares therein, and to destroy dogs and foxes that might come in pursuit of them, the defendant caused iron spikes, sharp at each end, to be driven into several trees; under which a hare might pass without injury, but a dog, in pursuing her, would be liable to be wounded or killed. The defendant had caused to be placed on the outside of the wood, notices that steel traps, &c., were set therein; and the plaintiff was sporting, with permission of Mr. *Townsend*, in his wood; when his dog, having started a hare, and pursued her into the defendant's wood, ran against one of the spears and was killed. I was of opinion that the defendant was not justified in setting the spears, as against the plaintiff who was lawfully sporting in the adjoining wood by the permission of the owner, there being no division between the two woods; and I assimilated it to a case of persons having common of vicinage. There, too, the plaintiff did all he could to prevent his dog from entering the defendant's wood. Here, however, the defendant not only gave no notice, and wilfully abstained from doing so, but used every endeavour to suppress the fact that the gun was set.

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Mr. Justice GASELEE.—I am of opinion that this question is set at rest by the decision of the Court of *King's Bench*, in *Ilott v. Wilkes*.

Postea to the plaintiff.

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A constable is justified in apprehending a person charged on suspicion of felony, if he have reasonable or probable cause to believe that the party charged is the felon; and it having been left to the jury to say, whether, on all the facts before them, they thought that the constable had reasonable ground to suppose that the party charged was guilty of felony, and whether they would have acted as the constable did:—Held, that this direction was right in substance, and that the constable did not exercise an undue degree of coercion, although he apprehended the party (a female) at night, without any warrant, and conveyed her to prison previously to taking her before a magistrate.

THIS was an action of trespass for an assault and false imprisonment, brought against the defendant *Russell*, a superintendant of the Cheltenham police, and the two other defendants, the one a constable, the other a collector of rates, who acted as the assistants of *Russell*, in taking the plaintiff into custody and conveying her to prison. Plea—Not guilty.

At the trial, before Mr. Justice *Gaselee*, at the last Assizes for the county of Gloucester, it appeared, that in November, 1827, the plaintiff, a female in the decline of life, lodged in the house of one *Ann Hammerton*, a milliner, at Cheltenham, who, in the evening of the 16th of that month, alleged that her house had been robbed, and the plaintiff's trunk, which was in her bed-room, and which contained a bank of England note for 10*l.*, a promissory note for 7*l.*, and various articles of jewellery and wearing apparel, was taken away; that, some time afterwards, the plaintiff discovered some of her clothes which were in the trunk concealed under a bed in Miss *Hammerton's* room, and several other small articles were found in her possession; that the plaintiff then left Miss *Hammerton's* house, and, on the 5th January, 1828, obtained a warrant at the public office at Cheltenham to search the house, the plaintiff having previously deposed that she had found some of the articles she had in her trunk

in the possession of Miss *Hammerton*; and that the plaintiff had suspected that Miss *H.* had been concerned in taking away the plaintiff's trunk, and robbing her of the articles therein contained. On Miss *Hammerton's* appearing before the magistrates on the 8th of January, the defendant *Russell* being present, the charge was dismissed. On Sunday, the 27th of January, following, Miss *Hammerton* came to *Russell*, and told him that she had strong grounds for believing that the robbery in her house had been committed by the plaintiff; and she shewed him a letter addressed to the plaintiff, at her house bearing the Cheltenham post-mark; and Miss *H.* said that she had opened the ends of the letter and looked into it, and that, from what she saw, she had good reason to believe that it would lead to a discovery of the thief. The letter was accordingly opened by *Russell*, at her request, when it was found to be dated London, January 19th, and signed, *Obadiah*, and appeared to be a communication from him as the receiver of the articles alleged to have been stolen from Miss *Hammerton*, and in which he requested the plaintiff to say how they should be disposed of, and requiring her to send him some money, thereby making her a participator in the alleged robbery. Miss *Hammerton* also told the defendant *Russell*, that, a few days after the robbery, a letter had arrived at her house for the plaintiff, in the same hand-writing, bearing the London post-mark; and that the plaintiff had refused to shew her its contents, although she had been requested to do so. Upon this, *Russell*, under the impression that the plaintiff had committed the robbery at Miss *Hammerton's* house, called the two other defendants to his assistance, and, at her request, proceeded to a house in Elm Street, Cheltenham, where she said the plaintiff was lodging, and where they arrived between ten and eleven o'clock at night: on their knocking at the door, it

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was opened to them, and the defendant *Russell*, without producing any warrant, apprehended the plaintiff, took her from her bed, and conveyed her to prison, where she was kept until the next morning, viz. the 28th January, when she was taken before Mr. *Capper*, a magistrate, by whom the deposition of Miss *Hammerton* was taken, charging the plaintiff with the theft, and she was thereupon committed to Northleach Bridewell for a further examination, until the 12th February, on which day she was again brought up before two magistrates, when Miss *Hammerton* stated that she had intercepted another letter addressed to the plaintiff at Miss *H.*'s house, and which was confirmatory of the other; and the magistrates considering that those letters afforded a strong ground of suspicion against the plaintiff, remanded her for a still further examination, until the 16th of February, when she was discharged for want of further proof.

At the following Spring Assizes for the county of Gloucester, the plaintiff preferred a bill of indictment for larceny against Miss *Hammerton*, who was found guilty of stealing the articles taken from the plaintiff's trunk, and was convicted, and sentenced to seven years transportation; and the day after the trial, she committed suicide in Gloucester goal; and the anonymous letter signed *Obadiah*, as well as the subsequent letter, were proved to have been written by Miss *Hammerton* herself. The learned Judge told the jury, that, if *Russell*, the constable, on the complaint being made to him by Miss *Hammerton*, believed, or had reasonable ground to suppose, that what she had told him was true, he had a right to take the plaintiff into custody; and he desired the jury to consider, whether, from the facts proved, coupled with the letter produced, by Miss *Hammerton* to *Russell*, and her statement to him, he had reasonable ground to suppose that the plaintiff was implicated in the robbery with which

she was charged, and whether, if the jury had stood in the place of *Russell*, they would have acted as he did; and the learned Judge also intimated an opinion, that, if the jury thought that there was reasonable ground for *Russell* to suspect that the plaintiff had committed the felony imputed to her, the defendants were entitled to a verdict. The jury having returned a verdict for them—

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*Russell*, Serjt. in the last term, obtained a rule *nisi* that it might be set aside, and a new trial granted, on the grounds,—First, of a misdirection by the learned Judge, viz. that the question whether the defendant *Russell* had or had not reasonable or probable cause for apprehending the plaintiff, was a question of law; and he relied on the case of *Hill v. Yates* (a), where, in an action of trespass and false imprisonment, for the apprehension of the plaintiff by the defendants (a constable and his assistant) for wood stealing, Mr. Baron *Garrow* left it to the jury to say, whether there was probable cause for the apprehension of the plaintiff, at the same time intimating it as his opinion, that there were sufficient grounds for the defendant's acting as they had done; and, on an application for a new trial, Mr. Justice *Dallas* said (b): “Since the case of *Sutton v. Johnstone* (c) the question of probable cause is a matter of law, and cannot be left to the jury.”—Secondly, although the apprehension of the plaintiff might have been justifiable, the jury ought to have been directed to consider whether the defendants had not, under the circumstances, acted with an unnecessary degree of violence or coercion, by dragging the plaintiff from her bed at a late hour of the night, there being no reason to induce them to believe that she would attempt to escape, as she was well known in Cheltenham, where she had long resided. Besides, the

(a) 2 B. Moore, 80; S. C. 8  
 Taunt. 182.

(b) 2 B Moore, 82.

(c) 1 Term Rep. 493, 784.

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defendants acted without any warrant; and in *Wright v. Court* (a), the Court seemed to intimate, that a constable cannot justify handcuffing a prisoner, except he has attempted to escape, or unless it be *necessary*, in order to prevent his doing so.

*Ludlow*, Serjt., now shewed cause, and submitted, that the direction of the learned Judge to the jury was, in substance, correct; and although, in *Hill v. Yates*, the Court said that the question of probable cause was a matter of law, yet Mr. Justice *Dallas* said, that it appeared that the learned Judge who tried the cause intimated to the jury that he thought there was probable cause: that he, therefore, should have nonsuited the plaintiff, and not allowed the case to have gone to the jury for their verdict. Here, however, the question left was, whether, from the letter produced by Miss *Hammerton* to the constable, coupled with the statement made by her at the time, and the facts proved, the constable *Russell* had reasonable ground to suspect the plaintiff of felony; and that, if he believed the representation made to him by Miss *Hammerton* to be true, he was justified in acting upon it and apprehending the plaintiff. But the case of *Beckwith v. Philby* (b) is an authority expressly in point. There, it was held, that a constable, having reasonable cause to suspect that a felony had been committed, was justified in arresting the party suspected, although it afterwards appeared that no felony had, in point of fact, been committed. There, too, the learned judge who tried the cause (c) was of opinion that the arrest and detention were lawful, provided the defendants (who were constables) had reasonable cause to suspect that the plaintiff had committed a felony; and he

(a) 6 D. & R. 623; 4 B. & C.  
 596.

(b) 6 B. & C. 635.

(c) Mr. Justice *Littledale*.



directed the jury to find a verdict for the defendants, if they thought upon the whole evidence; that they had reasonable cause for suspecting the plaintiff of felony; and a verdict having been found for the defendants, a motion was afterwards made to enter it for the plaintiff; not because the question had been improperly left to the jury, but on the ground that a constable had no authority, without a warrant, to apprehend a person, unless there was a charge of felony made by a third person, or unless a felony had been committed: and Lord Chief Justice *Tenterden* said, "Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and, in my judgment, most correctly. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a justice of the peace, to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas, a constable, having *reasonable ground* to suspect that a felony has been committed, is authorized to detain the party suspected, until inquiry can be made by the proper authorities. Now, in this case, it is quite clear upon the evidence, and the jury have so found, that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed; or was about to commit, a felony; and, the jury having so found, I am of opinion that the action was not maintainable."

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Although it has been said, that, in this case, it should have been left to the jury to say whether the defendants had not acted with an unnecessary degree of violence in apprehending the plaintiff and taking her from her bed to prison ; yet, she was not handcuffed, neither was any actual force used ; and, as she was charged with a felonious offence, which the defendant *Russell* had reasonable ground to suspect that she had been guilty of, he was justified in apprehending her as soon as the charge was made, and the constables were not bound to watch in the street all night. As, therefore, the defendants acted *bonâ fide*, and in the execution of their duty, it cannot be contended for a moment that they were guilty of any undue violence, no evidence having been offered to shew it. The learned Serjeant was proceeding with his argument, when the Court called upon—

*Russell*, Serjt. to support his rule. If the direction of the learned Judge to the jury be held to be correct, it will not only have the effect of destroying established legal principles, but of overturning several authorities which are expressly in point. The question that was substantially left to them was, whether the constable had reasonable ground to suppose that the plaintiff had been guilty of the felony with which she was charged ; and whether, if the jury had stood in his place, they would have acted as he did. Whether the constable had or had not reasonable or probable cause to apprehend the plaintiff, was a matter of law for the Judge to determine, and not a question for the decision of a jury. In *Sutton v. Johnstone*, which is a leading case on this subject, Mr. Baron *Eyre*, in delivering the judgment of the Court, said (a) : “ In our law, justification is a conclusion of law, which necessarily results from a given state

(a) 1 Term Rep. 507.

of facts;" and in the argument for the defendant in error, in that case, it was said (a), "the definition of probable cause is, such conduct in an individual accused, as will warrant a legal and reasonable suspicion of offence against the law, in the mind of the person accusing, so as that a Court can infer a prosecution to have been taken up on public motives. It is a mixed question of fact and law. What circumstances existed, and what knowledge the prosecutor had of them, is a question of fact: but, when the facts are known, and the mind of the prosecutor is laid open to the jury by evidence, then, whether it were a reasonable or unreasonable cause of proceeding, is a question of law." That doctrine was assented to by the Court, and Lord *Mansfield* and Lord *Loughborough*, in assigning their reasons to the Lord Chancellor, said (b): "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances alleged to shew it probable, or not probable, are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law: and upon this distinction proceeded the case of *Reynolds v. Kennedy* (c)." It is also an universal principle, and long established doctrine, that what is reasonable, is a question of law. Lord *Mansfield*, in treating of what should be a reasonable notice of the dishonour of a bill of exchange, said, in the case of *Tindal v. Brown* (d): "It is extremely clear that the holder of a bill, when dishonoured by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is partly a question of fact, and partly a question of law; it may depend in some measure on facts; such as, the distance at which parties live from each other, the course of the post, &c. But,

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(a) 1 T. R. 529.

(c) 1 Wils. 232.

(b) 1 T. R. 545.

(d) 1 T. R. 168.

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wherever a rule can be laid down with respect to this reasonableness; *that* should be decided by the Court, and adhered to by every one for the sake of certainty." So, Lord *Coke*, in treating of tolls, says (a): "What shall be deemed in law to be reasonable, shall be judged, all circumstances considered, by the Judges of the law, if it come judicially before them." Again, in the First Institute he says (b): "Reasonable time shall be adjudged by the discretion of the Justices before whom the cause dependeth; and so it is of reasonable fines, customs, and services, upon the true state of the case depending before them; for, reasonableness in these cases belongeth to the knowledge of the law, and is therefore to be decided by the Justices." Now, where the liberty of the subject is affected, the question as to what shall be a reasonable or probable cause of imprisonment, is of far greater importance than in cases of tolls, fines, or customs; and although it may be said that it only applies to an action on the case, yet, in *Swinton v. Molloy* (c), an action of false imprisonment was brought by the plaintiff, as purser of a man of war, against the defendant, who was his captain, and the latter pleaded a justification, for a supposed breach of duty; but it appearing in evidence that the defendant had imprisoned the plaintiff for three days, without inquiring into the matter, and had then released him on hearing his defence, Lord *Mansfield* ruled, that such conduct on the part of the defendant did not appear to have been a proper discharge of his duty, and therefore that his justification had failed him; and his lordship did not even leave the question to the consideration of the jury. And in the Second Institute it is said (d): "If treason or felony be done, whether the suspicion be just or lawful, shall be determined by

(a) 2nd Instit. 222.

(b) Co. Litt. 56, b.

(c) 1 T. R. 537, n.

(d) Page 52.

the justices in an action of false imprisonment brought by the party grieved ;” and here, if the defendants had pleaded a justification, they must have set forth the facts upon the record, and alleged that they had reasonable cause to suspect that the plaintiff had committed a felony, in consequence of which they had apprehended her : and whether they had such reasonable cause, would be a matter of law for the judge to determine ; for the only question which could be left to the jury would be, whether certain facts were proved, and not whether they amounted to a justification. The case of *Beckwith v. Philby*, does not apply to the present ; and, even if it did, it cannot be reconciled with former decisions. There, however, the learned judge was of opinion that the arrest and detention were lawful, provided the defendants had reasonable cause to suspect that the plaintiff had committed a felony, and he left it to the jury to say, *whether they thought, upon the whole evidence*, that the defendants had reasonable cause for suspecting the plaintiff of felony. Here, however, the whole matter was left entirely to the jury, which is inconsistent with the decision of this Court in *Hill v. Yates*. The learned judge who tried this cause should have stated that he thought that the defendants were justified in apprehending the plaintiff, if the jury should find, upon the facts proved, that they had reasonable cause for suspecting her of felony, and that they had acted bonâ fide upon such suspicion.

Secondly, it should have been left to the jury to say, whether the defendants had any reason to fear that the plaintiff would escape, or whether they had not acted with an unnecessary degree of violence in apprehending her, and taking her from her lodging at night. The defendants should either have shewn that the plaintiff attempted to escape, or that it was necessary to take her to prison on the night of her apprehension in order to prevent it ; and her age, and long residence at Cheltenham

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ham, coupled with the other circumstances proved at the trial, are conclusive to shew that there was no reason to dread an escape. In a case where no felony has been actually committed, a constable can only act on the necessity of the moment, nor can he do more than is actually requisite for the apprehension of the party accused; and he ought not to apprehend a person without a warrant, unless there be strong reason to suspect that the party will attempt to escape before a warrant can be procured. Although a constable, in the execution of his duty, may have just cause to apprehend a person accused, yet he cannot resort to coercive measures, or do any thing more than is necessary to prevent an escape; and if such a proceeding as the present were tolerated, the most respectable individuals might, upon the bare surmise or unfounded assertion of an unprincipled person, be dragged from their beds at midnight, and immured within the walls of a prison. Lord Coke says<sup>(a)</sup>: “ One or more justice or justices of the peace cannot make a warrant, upon a bare surmise, to break any man’s house to search for a felon or for stolen goods, and it would be full of inconvenience that it should be in the power of any justice of the peace, being a judge of record, *upon a bare suggestion*, to break the house of any person, of what state, quality, or degree soever, and at what time soever, either in the day or night, upon such surmises; but that since the statutes 1 & 2 *Philip and Mary*, c. 13, and 2 & 3 *Philip and Mary*, c. 10, if any person be charged with any manner of felony, and information be given to a justice of the peace, of the felony, or suspicion of felony, and he feareth that the king’s peace may be broken in apprehending him, the said justice may make a warrant to the constable of the town to see the king’s peace kept in the apprehending and bringing the party charged with, or suspected of the

(a) 4th Instit. 177.

felony, before him; and the party that giveth the information of his knowledge or suspicion to be present and arrest the delinquent." Great care, therefore, was formerly taken to preserve the public weal, and to secure the liberty of the subject. The power of granting warrants by magistrates, was afterwards extended against persons *suspected* of felony. In *Hale's Pleas of the Crown*, it is said (a): "A justice of the peace may issue a warrant to apprehend a person suspected of felony, though the original suspicion be not in himself, but in the party that prays his warrant; and the reason is, because he is a competent judge of the probabilities offered to him of such suspicion;" but, says Lord *Hale* (b), "it is fit, in all cases of warrants for arresting for felony, much more *for suspicion of felony*, to examine upon oath the party requiring a warrant, as well whether a felony were done, as also the causes of his suspicion; for he is in this case a competent judge of those circumstances that may induce the granting of a warrant to arrest." But a constable can only act without a warrant, where he fears the escape of the party; and although he may apprehend a person in the case of a felony committed, on the authority of Lord *Hale*, who says, (c) "It is not material whether he saw the felony committed, or hath it only by complaint and information; for, as well in one case as the other, he is bound to apprehend the felon, and make search after him within the limits of his jurisdiction, and to raise hue and cry upon him; and certainly, what may be done upon hue and cry raised upon a felon, may be done by that constable who, upon the first complaint, raiseth it." And that, "if there be a felony done, (suppose a robbery upon *A.*) and *A.* suspects *B.*, upon probable grounds, to be the felon, and acquaints the constable with it, and desires his aid to apprehend him, the constable may ap-

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(a) 4th Instit. ii. 109.

(b) Ibid. 110.

(c) Ibid. 91.

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prehend *B.* upon this account, though the suspicion arose in *A.* at first; yet there are to be these circumstances to accompany it:—First, *A.*, the person suspecting, ought to be present; for the justification is, that the constable did aid *A.* in taking the party suspected: Secondly, he ought to inquire and examine the circumstances and causes of the suspicion of *A.*, which, though he cannot do it upon oath, yet such an information may carry over the suspicion even to the constable, whereby it may become his suspicion as well as the suspicion of *A.*; and if the constable should not be allowed this latitude in cases of this nature, many felons would escape.” So Lord *Hale*, in treating of arrest without warrant, says, (a) “A constable may, ex officio, arrest a breaker of the peace in *his view*, and keep him in his house, or in the stocks, till he can bring him before a justice of the peace. So, if *A.* be dangerously hurt, and the common voice is that *B.* hurt him, or if *C.* thereupon comes to the constable, and tells him that *B.* hurt him, the constable may imprison him till he knows whether *A.* dies or lives, or can bring him before a justice. But if there be only an affray, and not *in view* of the constable, it hath been held he cannot arrest him without a warrant from the justice.” Again (b), “If a constable, *in pursuit* of a felon, requires the aid of *I. S.*, he is bound by law to assist him. Yet to avoid question in these cases, it is best to obtain the warrant of a justice, if the time and necessity will permit.” It therefore follows, either that there must be a *probability* of escape, or that the constable himself *saw* the felony committed, or was in the *actual pursuit* of the felon at the time, in order to justify his apprehending him without a warrant. Although, in *Samuel v. Payne* (c), it was held that a constable might justify an arrest on a reasonable charge

(a) 4th Instit. i. 587. (b) Ibid. 588-9. (c) 1 Doug. 358.



of felony without a warrant, though no felony had been; in point of fact, committed; yet Lord *Mansfield*, at the trial, considered the law to be, that, if no felony had been committed, the apprehension of a person suspected could not be justified by any person. In a note to that case it is said, that the point had been agitated on a demurrer to a special justification in the Year-Book, 7 *Hen. 4*, p. 35, pl. 3, and the Court there seemed to have thought, that if the cause of suspicion should appear reasonable, the justification would be good, though no felony were committed, but that the case was adjourned. And the case of *Ledwith v. Catchpole (a)* is also referred to, where Mr. Justice *Buller*, in the course of the argument, asked, "if a constable acts on suspicion, must it not, to make it a justification, be a reasonable ground of suspicion in *his own mind, and within his own knowledge*, and not merely the information of others; for, if it is not so, he takes upon himself to *judge* of the evidence of others, when he ought to go before a magistrate, who is the proper judge." And Lord *Mansfield*, in giving judgment, said, "Upon a highway robbery being committed, an alarm spread, and particulars circulated, and in the case of crimes still more serious, upon notice given to all the sea-ports, it would be a terrible thing, if, under *probable cause*, an arrest could not be made; and felons are usually taken up upon descriptions in advertisements." His lordship, therefore, seemed to form his opinion on the probability of an escape, as the words "probable cause" cannot be taken to refer merely to a probable cause of suspicion, but a probable cause to dread an escape of the party, if the officer had not apprehended him. There, too, a felony had been actually committed, and the constable acted *bonâ fide*, and in *pursuit* of the offender, upon such information as

(a) B. R. East, 23 G. 3, Cald. 291.

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amounted to a reasonable and probable ground of suspicion. In the case in the Year-Book (a), an action of trespass and false imprisonment was brought against a bailiff, and he pleaded, by way of justification, that certain persons came to him in London, and told him that the plaintiff and another were coming to London with certain oxen, which seemed to them to have been stolen; upon which he went to the plaintiff and the other person, and found the oxen in *an obscure place* in a house; and that he thereupon arrested the plaintiff by reason of the suspicion. There, however, as the plaintiff was a stranger in London, and the cattle were in a place of concealment, there was every reason to apprehend the escape of the parties; but if a constable can be deemed justified in apprehending and imprisoning a party without a warrant, on his own mere suspicion, where he has no reason to dread an escape, and may easily procure the warrant of a magistrate, it would not only be subversive of long established principles, but tend to infringe on the liberty of the subject; for if a constable or other officer may apprehend another on *mere suspicion*, every imprisonment on a charge of felony, although wholly unfounded, may be justified.

BEST, C. J.—This was an action of trespass, for an assault and false imprisonment. The defendant *Russell* was a constable or superintendant of the police at Cheltenham, and the two others acted in his aid and assistance as such constable; and he gave in evidence, under the general issue, strong circumstances to shew that he had reasonable and probable grounds for causing the plaintiff to be apprehended and imprisoned, from the facts disclosed to him by Miss *Hammerton*. The jury having found a verdict for the defendants, a motion has

(a) 7 Hen. 4.

been made for a new trial, on two grounds: First, on a supposed misdirection of the learned Judge to the jury; and, secondly, an omission on his part to leave it to them to consider whether the defendants were, under the circumstances, justified in treating the plaintiff in the manner they did. First, as to the misdirection, it has been said, that it was improperly left to the jury to say whether the constable had or had not reasonable and probable cause for apprehending the plaintiff. Probable cause is, no doubt, a question of law, and within the province of a Judge to decide; but the jury must not only first find the facts which are supposed to constitute the probable cause, but they are also warranted in forming their conclusion from those facts; and it is frequently difficult to draw the line between matter of law and matter of fact; and probable cause has been truly said to be a mixed question of law and fact. It has been insisted that, even if the jury had intimated their belief of the facts, as they did not amount to probable cause, the plaintiff should have been nonsuited; but I am clearly of opinion that, under the facts as proved, the learned Judge could not possibly have directed a nonsuit. It was necessary to leave it to the jury to say, whether or not they believed the facts before them; and if they did, whether they concluded from those facts that the constable had acted honestly, or as they themselves would have done. If he had not, or if he had acted under a mere pretence, or harshly or arbitrarily, without giving credit to the statement made to him by Miss *Hammerton*, the verdict should have been against the defendants, with heavy damages. But my brother *Gaselee*, in substance, left it to the jury to say, that if they believed all the facts proved, and from thence inferred that the constable was acting honestly and fairly, and in such a manner as they, under such circumstances, would

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have done, the defendants were entitled to a verdict. This was, in reality, telling them, that in his opinion the facts before them, if believed, furnished a probable cause for the defendant's conduct. If the direction of a Judge to a jury be right *in substance*, a mere inaccuracy of expression, or general remark, must not be considered as a misdirection, so as to make it a ground for an application to the Court for a new trial. But it has been said that a constable has no right, on a mere suspicion, to apprehend a person on a charge of felony without a warrant from a magistrate. That, however, is not so. A distinction has long since been taken in the law, between common persons and those who are armed with authority, and which they are bound to exercise in the execution of their duty. Although a private individual cannot arrest another on a bare suspicion of felony, unless he can shew a felony actually committed, yet a constable may do so; for if the latter have *reason to suspect* that a felony has been committed, it is sufficient to justify him. This has been decided so frequently, that it is unnecessary to refer to cases on the subject. Had then the constable in this case reason to suppose that a felony had been committed, and by whom? Miss *Hammerton* told him that she had lost her property, and that the plaintiff had robbed her; that the plaintiff had an opportunity of robbing her whilst she lodged in her house; and that her suspicions were confirmed by an anonymous letter, which she gave to the constable, desiring him to open it, which he did in her presence. He had then no means of knowing that the letter was fabricated, or written by Miss *Hammerton* herself. He, of course, thought that it came from London, where it was dated; and the contents of the letter, if genuine, would justify him in apprehending the plaintiff on a suspicion of felony. The letter, as well as all the other

facts attending it, were submitted to the consideration of the jury, and they were desired to say whether, from the whole of what they had heard, the defendant *Russell* had reasonable grounds to suspect the plaintiff of felony, so as to justify him in apprehending her in his character of constable. The Fourth Institute (a) has been referred to, for the purpose of shewing that a constable cannot arrest upon suspicion, even under the warrant of a magistrate. But it is there said, that "one or more justices of the peace cannot make a warrant, upon a *bare surmise*, to break any man's house to search for a felon or for stolen goods; and that it would be full of inconvenience that it should be in the power of any justice of the peace, being a judge of record, upon a *bare suggestion*, to break the house of any person upon such surmises." A *bare surmise* or *suggestion* differs widely from a case where there is a reasonable ground for suspecting that a party has been guilty of felony: and Lord *Coke* refers to the Year-Book, 13 *Edw.* 4, fol. 9, where it was held, that for felony, or suspicion of felony, a man might break the house to take the felon, because it was for the common weal, and because the King had an interest in the felony. The authority of Lord *Hule*, to which we have been referred, appears to me to be against the position for which it was cited. It is there said (b), "a constable may, ex officio, arrest a breaker of the peace in his view without any warrant, and keep him in his house, or in the stocks, till he bring him before a justice of the peace. So if a felony be committed, and A. acquaints him that B. did it, the constable may take him and imprison him, at least, till he can bring him before some justice of the peace. But that if there be only an affray, and not in view of the constable, it hath been held he cannot arrest him without a warrant from

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(a) Page 177.

(b) Vol. i. 587.

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the justice; but it seems he may, to bring the offender before a justice, though not compellable." Again, Lord *Hale* says, "if there be a felony done, (suppose a robbery upon *A.*.) and *A.* suspects *B.*, upon probable grounds, to be the felon, and acquaints the constable with it, and desires his aid to apprehend him, in this case, I say, the constable may apprehend *B.* upon this account, though the suspicion arises in *A.* at first." The case of *Samuel v. Payne* is an express authority to shew, that a constable and his assistants may justify an arrest on a reasonable charge of felony without a warrant, although no felony had in fact been committed. And here Miss *Hammerton* not only charged the plaintiff with felony, but said, that she had every reason to suspect that she had robbed her, and stated the grounds for such suspicion; and, on these facts, coupled with the letter produced by her to the constable at the time, the Jury found that he had reasonable and probable grounds to apprehend the plaintiff.

Secondly, it has been said, that it should have been left to the jury to say, whether, under the circumstances, the constable had not exercised an undue degree of violence or coercion; and it has been insisted, in support of that position, that he had no right to apprehend the plaintiff at the hour of night he did: and that even if he had, he could not be justified in taking her from her bed and compelling her to go to prison. But what was the constable to do? When the charge was made to him by Miss *Hammerton*, he was bound immediately to go to the house where the plaintiff was living; and if he had not done so, he would be responsible for a breach of duty. A direct charge was made by Miss *Hammerton* against the plaintiff, and on which the constable was bound to act, and he had not time to exercise his own discretion. Besides, he not only heard the charge, but

was shewn the anonymous letter in support of it, which directly accused the plaintiff of being a participator in the robbery; and, on Miss *Hammerton* shewing him where the plaintiff then resided, he was not bound to stay at the door of the house all night, nor to watch all the doors and windows to prevent the possibility of an escape. It was proved, that he used no unnecessary violence, and on the door being opened to him, he was bound to apprehend the party accused. The case certainly has raised questions of considerable importance, not only to constables, but to the public at large, and it has been most fully and ably argued. It is important to constables, as they ought to know the extent of their authority, but that they must not exceed or abuse it; and to the public, that constables or other officers should not be interrupted in the due discharge of their duty. Courts of justice will never countenance acts of ill usage, or unnecessary violence or restraint; but we ought not to support the idea, that a constable is not justified in entering a house at night to apprehend a person not only suspected, but directly charged with felony. A party is not to be decoyed out of a house by unfair means, or to be treated with cruelty or severity after his apprehension, but it is necessary when a constable has once apprehended him to keep his person secure. I much regret the inconvenience and sufferings the plaintiff has sustained, as there can be no doubt of her innocence; but they were occasioned by the wickedness of Miss *Hammerton*, of whom the constable and his assistants were the innocent instruments; and I am, therefore, of opinion, that the rule for a new trial must be discharged.

PARK, J.—I, also, am extremely sorry for the situation in which the plaintiff has been placed by

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the iniquitous conduct of her accuser; but we must administer justice to all, equally and impartially, and divest our minds of any hardship to which a party may have been unjustly put. I do not seek to impeach any of the authorities, to which we have been referred, in the able argument of my brother *Russell*; and, although I admit that the question of reasonable or probable cause, is a question of law for the Judge, yet it must be necessarily compounded of facts on which the jury must decide; and it has been my constant practice, in cases of this description, to leave it to the Jury to say, whether they believed the facts, as proved, to be true; and if they do, I tell them that I think that they amount to a reasonable and probable cause to justify the party for the act done. So, here, my brother *Gaselee* left it to the Jury, in substance, to say, whether they believed, on the whole of the facts before them, that the constable had reasonable ground to suppose that the plaintiff had been guilty of felony, so as to justify his apprehending and taking her to a place of custody. In *Hill v. Yates*, the learned Judge left it to the Jury to say, whether there was probable cause for the apprehension of the plaintiff; but, at the same time, intimated it as his opinion, that there were sufficient grounds for the defendants (a constable and his assistant), to act as they had done. But he should have told the Jury, that, if they believed the facts adduced in evidence for the defendants, they, in his opinion, would amount to a probable cause. But my brother *Gaselee* left this case to the Jury, in substance, in the same terms as my brother *Littledale* did in *Beckwith v. Philby*, where he directed them to find a verdict for the defendants, *if they thought, upon the whole evidence*, that the defendants had reasonable cause for suspecting the plaintiff of felony; but he had, at first, intimated an opinion, that the arrest and



detention were lawful, provided the defendants had reasonable cause for such suspicion. And Lord *Tenterden*, on motion for a new trial, said, "whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the Jury. The only question of law in the case is, whether a constable, having reasonable cause to suspect that a person has committed a felony, may detain such person until he can be brought before a Justice of the Peace, to have his conduct investigated. There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas, a constable, having reasonable ground to suspect that a felony has been committed, is authorised to detain the party suspected, until inquiry can be made by the proper authorities." There, as here, the direction to the jury was tantamount to this,—viz. that, if they thought the defendants had acted *bonâ fide*, the Judge was of opinion that they had probable cause for the step they had taken. I fully concur with my Lord Chief Justice in thinking, that if the direction of a Judge to a Jury be right in substance, and the verdict be consistent with it, such verdict ought not to be disturbed.

But it has been said, that the constable was not warranted in acting as he did, in going to the house where the plaintiff lived, at night, and taking her from her bed to prison, unless he had reason to dread an escape. But, if a constable be informed that a felony has been actually committed, and that the suspected party is residing in a particular house, although such person might be a man of property or consequence, yet it is the duty of the

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constable to repair immediately to the house, and not to stay outside the door all night, or even in the room, after the party is apprehended. The committal of the plaintiff by the magistrate, on the following morning, affords a strong presumption that the constable acted *bonâ fide*; and as she was directly charged with having committed a felony, he had some reason to fear an escape; and he was, therefore, justified in apprehending the plaintiff, and imprisoning her till he could bring her before a magistrate, according to the authority of Lord *Hale*; for Miss *Hammerton* not only told the defendant, *Russell*, that a felony had been committed, but that she had every reason to believe that the plaintiff was concerned in the robbery; and she produced a letter, to shew that her suspicions were well founded.

BURROUGH, J.—Whenever a direct charge of felony is made to a constable, he is bound to act upon it immediately, and he has a right to apprehend the party accused, and keep him in custody, if he has any reason to fear an escape, and the charge itself is sufficient to raise such an apprehension. Although the constable and his assistants might protect themselves under the plea of the general issue, yet, if they had pleaded a justification, stating that a felony had been committed, and that they had been informed of it; that the plaintiff was living in the house where the alleged trespass was committed, and that the defendants, as constables, had good reason to suspect that the felony was committed by her, it would be a good defence to this action. The information given to the constable by Miss *Hammerton*, that she had reason to suspect the plaintiff, as she lodged at her house at the time of the alleged robbery, added to the terms of the letter, which were corroborative of that fact, were sufficient to create a strong suspicion in the mind of the constable; and she further

desired him to take the plaintiff into custody, and shewed him where she resided; and he accordingly did so: and if he supposed, at the time, that the statement made by Miss *Hammerton* was true, he was fully warranted in acting as he did. The subsequent conviction of that woman has raised the main difficulty in this case; but the question is, on what grounds did the constable act at the time of the apprehension of the plaintiff. I think he acted rightly, and in the due execution of his duty, as he had every reason to believe that the plaintiff had committed a felony; and, on a charge of that nature being made, he had cause to fear an escape; and when he had apprehended the plaintiff, it was his duty to take her to a place of security, previously to the charge being heard before a magistrate.

GASELEE, J.—As the Court think that this verdict ought not to be disturbed, I not only agree with them, but, on reviewing all that has been urged for the plaintiff, I still entertain the same opinion I formed at the trial. I felt much anxiety for the plaintiff, as I thought it a very hard case upon her. I do not recollect all my expressions to the jury, but I stated to them, in substance, that if they believed all the facts adduced on the part of the defendants, and would have acted as they did, if they were placed in their situation, they amounted to a probable cause to justify the apprehension of the plaintiff. I certainly did not mean to leave the question of probable cause to them, as I had the case of *Beckwith v. Philby* before me; and notwithstanding I was requested to nonsuit the plaintiff, I thought that I ought not to do so, although I have sometimes acquiesced in so doing, after the defendants' case had been gone through; but, when there is any doubt as to the facts, they must be found by the Jury. Here, the plaintiff's *prima facie* case was contradicted by the facts proved

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for the defendants ; and, as they appeared to me to be of a complicated nature, I left it to the Jury to determine, whether, after all they had heard, they thought that the defendant, *Russell*, had reasonable cause for suspecting the plaintiff of felony ; and also, whether he and his assistants had acted *bonâ fide* in apprehending and detaining her ; and that, if they were satisfied on those points, I thought they were entitled to a verdict ; and as to the *bona fides* of the transaction, I asked them whether, under the circumstances, they would have acted as the constable did, on his receiving information from *Miss Hammerton*. With regard to the objection, that the defendants exercised an unnecessary degree of coercion, although it is a most important question, we have been referred to no authority which goes the length of saying, that a constable cannot detain, or take to a place of safe custody, a party whom he has apprehended on suspicion of felony, unless he has reason to fear an escape.

Rule discharged.

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WRIGHT v. WALES.

Plaintiff, a surveyor, being occupied in making a road over common

THIS was an action of trespass and false imprisonment, which was brought against the defendant for assaulting the lands belonging to a township ; defendant, as *sen-reeve*, or person having the care of such lands, asked plaintiff by whose authority he acted ; to which plaintiff replied, that he was ordered to make the road by a magistrate : defendant then told plaintiff, that, if he did not desist, he should consider him as a wilful trespasser ; and as plaintiff still continued the work, and did not shew any order or warrant authorising him to make the road, defendant caused him to be apprehended and taken before a magistrate, who refused to receive the complaint ; on which plaintiff brought trespass against defendant for an assault and false imprisonment :—*Held*, that defendant was entitled to notice of action, under the 7 & 8 *Geo. 4*, c. 30, s. 41, as he had reason to suppose that he was acting under colour of that statute, in causing plaintiff to be apprehended, although he was not in fact committing a wilful or malicious injury at the time.

plaintiff, and taking him into custody, and carrying him before a magistrate. The damages were laid at 500*l*. Plea—Not guilty. At the trial, before Mr. Justice *Holroyd*, at the last Assizes for the county of Suffolk, it appeared that, on the 16th January, 1828, the plaintiff, (a surveyor,) being employed in directing workmen, with a number of teams or waggons, in cutting up turf, and carting and spreading beach, shingle, and gravel, for the purpose of forming a road, thirteen feet in width, over certain common or town lands, in the parish of Walberswick in the county of Suffolk; the defendant, as the *fen-reeve*, or person employed by the township to take care of the lands, and to make entries of cattle depastured thereon, and to receive the monies paid for them, and generally to do all acts connected with the town property; asked the plaintiff, by the desire of the commoners, by whose authority he was employed: to which he answered, he was ordered to make the road by a magistrate; the defendant then said, that the plaintiff had no business upon the land, and desired him to leave off working there, and that, if he did not, he should consider him as a wilful trespasser; and as the plaintiff did not shew the defendant any warrant or other authority from the magistrate for his so acting, the defendant ordered a constable to take him into custody; and the same day took him before a magistrate, who refused to receive the complaint, and ordered the plaintiff to be discharged; on which the present action was commenced. It also appeared that the defendant thought he was justified in acting as he did, and that he was not actuated by any ill-will or malicious feeling towards the plaintiff; and it was contended for the former, that he was justified in causing the plaintiff to be apprehended under the act for consolidating and amending the laws relating to malicious injuries to property, viz. the 7 & 8

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*Geo. 4, c. 30, s. 28 (a)*, as he was acting as the servant, or under the authority of the commoners, who might be considered as the owners of the property in question. The Jury, under the direction of the learned Judge, who stated that they must give a reasonable compensation, malice being out of the question, found a verdict for the plaintiff, damages twenty shillings; leave being reserved to the defendant to move to set it aside, and that a non-suit might be entered, in case the Court should be of opinion that the plaintiff was, under the circumstances, doing a wilful or malicious injury, within the intent and meaning of the 24th section of the statute (*b*).

*Wilde*, Serjeant, in the last Term, accordingly obtained a rule nisi: First, on the ground that the defendant

(*a*) By which, for the more effectual apprehension of *all offenders against the act*, it is enacted, "that any person *found committing any offence against the act*, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, *by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him*, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

(*b*) By which it is enacted, "that if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, for which no remedy or

punishment is hereinbefore provided, every such person being convicted thereof before a justice of the peace, shall forfeit and pay such sum of money, as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of 5*l*."—And the 25th section enacts, "that every punishment and forfeiture by the act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed *from malice conceived* against the owner of the property, in respect of which it shall be committed, *or otherwise*."

was justified in arresting the plaintiff under the 28th section of the statute, as he was committing an offence within its meaning; and secondly, that the defendant was, at all events, entitled to a notice of action, under the 41st section of the act (a).

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*Storks and Bompas*, Serjts., now shewed cause. Unless the plaintiff were manifestly doing a wilful or malicious injury at the time of the act complained of, there is no pretence for saying that the defendant could have any colour for apprehending him by virtue of the statute, 7 & 8 Geo. 4; and as the plaintiff was acting under the supposed authority of a magistrate, he cannot be considered as a person falling within either of the provisions of that act. Although the defendant might have considered himself justified in apprehending the plaintiff under the 28th section, yet the proviso in the 24th is a complete answer, by which it is expressly provided, that "nothing in the act contained shall extend to any case, where the party trespassing acted under a *fair and reasonable supposition* that he had a right to do the act complained of." If so, no notice of action to the defendant could have been necessary under the 41st section, which requires such notice to be given in actions to be commenced against any per-

(a) By which, for the protection of persons acting in the execution of the act, it is enacted, "that *all actions* and prosecutions to be commenced against any person *for any thing done in pursuance of the act*, shall be laid and tried in the county where the fact was committed, and shall be commenced within six calendar months after the fact com-

mitted, and not otherwise, and notice in writing of such action, and of the cause thereof, shall be given to the defendant, one calendar month at least before the commencement of the action; and, in any such action, the defendant may plead the general issue, and give the act and the special matter in evidence at any trial to be had thereupon."

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son for any thing done in pursuance of the act; and, as the plaintiff had a fair and reasonable ground to suppose that he had a right to make the road under the authority of the magistrate, his apprehension by the defendant could not be justified, although the latter might have thought that he was authorised in so doing. The apprehending the plaintiff was not even under colour of the act, much less in pursuance of it; and as he could not have been aware that he had been guilty of an offence within it, the defendant cannot be entitled to its protection, as he did not act in discharge of his public duty as *fen-reeve*, or within the scope of his authority as such; and even if he did, he cannot be considered as the servant of the owner of the property injured, as he was the mere agent of the townsmen, having a right of common over the lands in question; and he did not act himself, but directed a constable to take the plaintiff into custody; and although he told him that he should consider him as a wilful trespasser, there was no evidence that he charged him as such before the magistrate; and therefore the plaintiff could not suppose that the defendant was entitled to a notice of action, under a statute of which he had no knowledge. This case can scarcely be distinguished in principle from that of *Cook v. Leonard* (a), which was an action for an assault and false imprisonment; and it appeared at the trial, that the defendants, (the one a constable, and the other a surveyor to commissioners under a local act for paving, lighting and improving the town of Stroud), had authority to apprehend all vagrants, and idle and disorderly persons, who should be found wandering or misbehaving themselves *during the hours of keeping watch* within the limits of the town:—and it was by the act declared, that no plaintiff should recover in any action commenced against

(a) 6 B. & C. 351; 4 D. & R. M. C. 360.



any person *for any thing done in execution of or under authority of the act*, unless notice in writing should be previously given to the person intended to be sued, twenty-eight days before such action should be commenced; and as the defendant attempted, at five o'clock in *the day time*, to take a dromedary out of a stable, which two foreigners had been exhibiting in the town, and the plaintiff, who was present, told one of them that the constables had no authority to order him to take the dromedary out of the town; upon which one of the defendants took hold of the halter in order to remove the dromedary; and on the plaintiff's attempting to prevent him, the defendant assaulted the plaintiff, and imprisoned him; it was held, that as the attempt to seize the dromedary was not made during the hours of watch, and the constables did not attempt to apprehend the owner, but the animal itself, the constables were not entitled to the notice of action given by the act, as such notice could only be necessary in those cases in which the party against whom the action was brought, had reasonable ground for supposing that the thing done by him was done in execution of or under the authority of the act; and *Bayley, J.* after citing the cases of *Weller v. Toke (a)*, and *Bird v. Gunston (b)*, in order to shew that magistrates acting beyond the limits of their authority, have been held to be within the protection of particular statutes entitling them to notice of action, said, "These cases fall within the general rule applicable to this subject, viz. that where an act of parliament requires notice before action brought, in respect of any thing done in pursuance, or in execution of its provisions, those latter words are not confined to acts done strictly in pursuance of the act of parliament, but extend to all acts done *bonâ fide*, which may reasonably be supposed to be done in

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(a) 9 East, 364.

(b) 24 Geo. 3.

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pursuance of the act. But where there is no colour for supposing that the act done is authorised, there notice of action is not necessary." And, after citing the cases of *Lawton v. Miller* (a), and *Morgan v. Palmer* (b), and applying the principles deducible from those cases to that before him, that learned Judge concluded by saying, "where an act of parliament says, that, in the case of an action brought against any person for any thing done in pursuance or in execution of the act, the defendant shall be entitled to certain privileges, the meaning is, that the act done must be of that nature and description, that the party doing it may reasonably suppose that the act of parliament gave him authority to do it. I think, that, in this case, the defendants had no reasonable grounds for thinking that the act of parliament gave to them, or to the commissioners under whose authority they acted, any power to remove the dromedary from the place where it was, at the time when they attempted to remove it; and that being so, I am of opinion that the rule for a new trial must be made absolute." And *Holroyd, J.* said: "In order to entitle the defendant to notice, they ought to have had a colourable authority for removing the dromedary." So, here, the defendant ought at least to have had a colourable authority for apprehending the plaintiff; and, as he cannot be considered as doing a wilful or malicious injury at the time, or committing an offence within the terms of the statute, the defendant could not be entitled to notice; and more particularly so, as the plaintiff supposed he was justified in making the road, as he expressly told the defendant that he had the order of a magistrate to do so. The 41st section is, at all events, controlled by the proviso in the 24th; and in *Looker v. Halcomb* (c), which

(a) E. T. 1818. MS.  
 (c) 4 Bing. 183.

(b) 4 D. & R. 283; 2 B. & C. 729.

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was an action of trespass for an assault and false imprisonment, and the plea was that the plaintiff was *wilfully* breaking down the defendant's fences, wherefore he apprehended the plaintiff and took him before a magistrate; and the plaintiff replied, that he broke the fences in the *bonâ fide* assertion of a right of way; and the plea was framed with a view to bring the defendant's case within the malicious trespass act, 1 *Geo.* 4, c. 56, which is repealed by the statute 7 & 8 *Geo.* 4, c. 30: Lord Chief Justice *Best*, said (a): "An act of parliament, which takes away the right of trial by jury, and abridges the liberty of the subject, ought to receive the strictest construction; nothing should be holden to come under its operation that is not expressly within the letter and spirit of the act. If the Courts were to decide upon a different principle, the law which has been the subject of discussion this day, would become an intolerable grievance, placing the liberty of the subject in the hands of any owner of property who might think himself aggrieved by a claim of right. The statute can only apply to cases where a party enters, having no colour, and *knowing* he has no colour of right to enter." Here, however, the plaintiff thought that he was, by the order of the magistrate, authorised in acting as he did.

*Wilde*, Serjt., in support of his rule. Under the circumstances of this case, it is quite clear that the defendant, at the time he caused the plaintiff to be apprehended, supposed that he was fully justified in so doing, and that he was acting *bonâ fide* under the authority of the statute in question; as he told the plaintiff, that, if he did not desist from working, he should consider him as a *wilful trespasser*. Besides, the defendant, as *sen-reeve*, had the care of the town lands, he therefore stood in the

(a) 4 Bing. 188-9.

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situation of a public officer, and it was his duty as such, to prevent all injuries and encroachments on the lands; and as the plaintiff was found in the act of doing an immediate injury on a part of such lands, by cutting up turf, and making a road; and as he did not shew the defendant any order or authority under which he acted, or which might justify the committing the trespass complained of, the defendant was fully warranted in supposing that he was acting maliciously, or at least wilfully: and the words of the statute are in the alternative; for, if any person shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, either of a public or private nature, it falls within the 24th section of the act. The defendant, therefore, supposing that he was authorised to take the plaintiff before a magistrate, in pursuance of the act, was entitled to notice of action within the 41st section, although the magistrate dismissed the complaint, and discharged the plaintiff on his being brought before him. The question then is, whether the defendant, having a special duty to perform, thought that he was acting *bonâ fide*, and under the supposition that the plaintiff was wilfully committing a damage or injury upon the land over which he had the care. If so, he was clearly entitled to notice; for, where a statute gives protection to persons acting in execution or in pursuance of it, all those who act under its provisions are entitled to that protection, although they exceed their authority by so doing; and, if the defendant acted under colour of the authority of the act, but overstepped his authority, he would be entitled to notice of action, although the plaintiff might not have been committing a wilful or malicious injury, or doing any act which would bring him within the terms or meaning of the statute. In *Gaby v. The Wilts and*

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*Berks Canal Company* (a), a proviso in a local act of parliament, that all actions should be brought against any person or persons for any thing to be done by him or them in pursuance of the act, or in the execution of the powers and authorities therein given, within six calendar months next after the fact committed, was held to extend to a case where the parties did an act within the limits of their official authority, but exercised that authority improperly, believing at the time that they were acting within it; and Lord *Ellenborough* said, "We are called upon to put a general construction on the terms of this act of parliament, and to say whether the thing done by the company can be considered as so far done in pursuance of the act, or in execution of its powers and authorities, as to be within the limited protection of the act, though what has been done by them is not borne out in its full legality by the course that they have pursued. The way in which the statute 24 Geo. 2, c. 44, was construed by Lord *Kenyon* (a), seems to have been much like the construction we are now giving to this act; for he thought that, if a person does an act within the limits of his official authority, but exercises that authority improperly, or abuses the discretion placed in him, *eatenus*, the statute extends." And Mr. Justice *Le Blanc* said, "The question is not, to what extent the company have offended, nor whether they have done the act in such a manner as to clothe themselves with the character of persons conforming in all respects to the authority given them by the act, but whether they have done this wilfully and maliciously. If they did it *bonâ fide*, they will be protected as to the time of commencing the action." And Mr. Justice *Bayley* added, "The question seems to come to this, whether the company were acting *bonâ*

(a) *Alcock v. Andrews*, 2 Esp. Rep. 542.

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fide, for, if they were not so acting, they are not brought within the protection of the act." So, here, the only question is, whether the defendant acted *bonâ fide*, in causing the plaintiff to be apprehended, on the supposition that he was doing a wilful or malicious injury to the land over which the defendant had the superintendence and care; and, although he might have been mistaken in thinking that the plaintiff was committing a trespass of such a nature as would bring him within the terms of the statute, yet the defendant was entitled to the notice of action thereby prescribed.

PARK, J.(a).—I am of opinion, that, under the circumstances of this case, the defendant was entitled to notice of action. If he had been acting legally, he would not have required the protection of the statute by which the notice is given. He meant to act in his character of *fen-reeve*, and, as such, must be considered as a public officer; and, if he exceeded his authority, or made a mistake, still, if he had reason to suppose that he was acting in pursuance of the statute, he is entitled to the protection which the law intended to throw round him. The act in question has been improperly termed the petty trespass act, but it applies to malicious injuries of the highest description, viz. the setting fire to churches or coal mines, and the destruction of machinery used in the manufacturing of silk, or for agricultural or other purposes. The language of the statute is immaterial; and although the act done by the plaintiff was not an offence within its meaning, yet if the defendant thought that he was acting *bonâ fide* and under colour of the act, he ought to have had the notice of action required by the 41st section, according to the principle established in

(a) Lord Chief Justice *Best* was at chambers.

the case of *Gaby v. The Wilts and Berks Canal Company*.

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BURROUGH, J.—There can be no doubt but that the defendant acted beyond the provisions of the statute; yet it is equally clear that he supposed that he was acting under it, as he told the plaintiff, that, if he did not desist from working, he should consider him a wilful trespasser: and the defendant was to judge whether the plaintiff was committing an offence which would justify his immediate apprehension; and if he thought he was, he is entitled to the protection of the statute, and the notice of action required by it. In *Bolton v. Boldero*, the defendant, a justice of the peace, having called his coachman or groom into the parlour, ordered him to saddle a horse for his daughter; and on the servant's saying he would be damned if he did, the magistrate directed a warrant to be made out against him, under which he was committed; and the groom having brought an action against his master for false imprisonment, but laid the venue in the county where the prison was situate, he was nonsuited; it being held by Lord *Mansfield*, that the defendant having supposed that he had a right to commit, was entitled to be sued as a magistrate, and, consequently, that the action should have been brought in the county where the alleged act was committed (*a*), although he had acted without jurisdiction. Here, if the defendant had acted legally, he would not have required the protection of the act; and if he acted *bonâ fide* and under colour of its authority, he was entitled to the notice thereby required; and I think there can be no doubt that he supposed he was acting under the authority of the act, when he caused the plaintiff to be apprehended.

(*a*) See the statute 21 Jac. 1, c. 12, s. 5.

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GASELER, J.—If the defendant could have justified the act complained of by the plaintiff, he would not have required the protection of the statute; and it appears to me to be quite clear, that he supposed that he was acting under the act. This case, therefore, is distinguishable from that of *Cook v. Leonard*, as there the defendants had no colour under the act of parliament for seizing the dromedary in the day-time, it not being during the hours of watch; but here, I cannot say that the defendant had no colour for supposing that he was justified in apprehending the plaintiff, or that he did not think that he was proceeding under the authority of the statute. The rule for entering a nonsuit must, therefore, be made

Absolute.

MILLS v. COLLETT, Clerk.

Where a party was charged on oath before a magistrate under 7 & 8 Geo. 4, c. 30, s. 19, with having maliciously cut down a tree adjoining a dwelling-house, and was committed as a felon, and the

THIS was an action of trespass for an assault and false imprisonment. The declaration stated, that the defendant, on the 18th October, 1827, made an assault upon the plaintiff, at Chediston, in the county of Suffolk, and forced and compelled him to go out of a certain dwelling house there, into a public highway, and from thence to a certain prison, situate at Beccles in that county, and there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause, for the space of four months then next

informer did not prosecute:—*Held*, that the committing magistrate was not liable in trespass, although it appeared on the face of the depositions under which the party was committed, that he was *the occupier* of the land on which the tree grew.

A magistrate should not allow depositions to be framed in the words of a clause in a statute under which a party is committed.

In a notice of action to a magistrate the residence of the plaintiff's attorney was described as of Half Moon Street, Piccadilly, London. *Quere*, whether it was sufficient; Half Moon Street being in the county of Middlesex.



following; whereby the plaintiff was not only greatly exposed and injured in his credit and circumstances, but hindered and prevented from performing and transacting his lawful and necessary affairs and business. Plea—Not guilty.

At the trial, before *Vaughan*, B., at the last assizes for the county of Suffolk, it appeared that the defendant was one of the magistrates of that county, and that the plaintiff had been brought before him on a charge of having unlawfully and maliciously cut down a timber tree, in the parish of Chediston. It appeared by the evidence adduced for the plaintiff, that he occupied a farm in that parish, and that on the 18th October, 1827, a warrant was issued by the defendant and Mr. *Browne*, another magistrate for the county of Suffolk, on a complaint made against the plaintiff upon oath by one *Balls*, one of the churchwardens of Chediston. The information was as follows:—

“ Suffolk, to wit.—The information and complaint of *Robert Balls*, of Chediston, in the county of Suffolk, gentleman, made on oath before us, two of his Majesty’s justices of the peace in and for the said county of Suffolk, the 17th October, 1827; who saith, that on the 15th day of October, instant, in the parish of Chediston, in the said county, *Simon Mills*, of Chediston, aforesaid, farmer, and *Abraham Hammond*, of the parish of St. James’s, South Elmham, in the said county, labourer, did, wilfully and maliciously, cut, break, bark, root up, or otherwise destroy and damage, a certain timber elm tree, growing in a yard adjoining to the dwelling-house belonging to a farm in Chediston aforesaid, of the value of 1*l.* and upwards, the property of *John Baddeley*, doctor of physic, contrary to the statute made in the 7th and 8th years of the reign of King *George* the 4th, intituled, “ An act for consolidating and amending

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the laws in England, relative to the malicious injury of property;" and thereupon, he, the said informer, prayeth the judgment of us, the justices aforesaid, in the premises.

*Robert Balls.*

Taken and sworn before us, *Anthony Collett, (L.S.)*  
*L. R. Browne. (L.S.)"*

That the plaintiff voluntarily appeared before the magistrates at Yoxford, on the 18th October, when the following depositions were taken by the magistrate's clerk.

" Suffolk, to wit:—The deposition of *Robert Balls*, wheelwright, of the parish of Chediston, in the county of Suffolk, taken and made upon oath before us, two of his Majesty's justices of the peace for the said county, this 18th day of October, 1827, who saith that he knows the certain elm tree cut down by *Simon Mills*, of Chediston, aforesaid, farmer, and *Abraham Hammond*, of the parish of St. James, South Elmham, labourer, *on the premises* of the said *Simon Mills*; and that it is worth more than 1*l.* sterling,

*Robert Balls.*

Before us, *L. R. Browne, (L.S.)*  
*A. Collett. (L.S.)"*

" Suffolk, to wit:—The deposition of *John Storkey*, husbandman, in the parish of Linstead Parvor, in the county of Suffolk, taken and made upon oath before us, two of his Majesty's justices of the peace for the said county, this 18th day of October, 1827; who saith, that on Monday last, the 15th day of the present month of October, *on the premises occupied by Simon Mills*, in the parish of Chediston, in the said county, the property of *John Baddeley*, doctor of physick, namely, in the yard ad-

joining and belonging to the dwelling-house of the said premises; he saw *Simon Mills* of Chediston aforesaid, and *Abraham Hammond*, labourer, of the parish of St. James, South Elnham, wilfully and maliciously cutting, breaking, rooting up, and otherwise destroying a certain timber elm tree, the property of the said *John Baddeley*.

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*John Storkey*, ✕ (his mark.)

Before us, *L. R. Browne*, (L.S.)  
*A. Collett*. (L.S.)”

That the plaintiff was thereupon committed to Beccles gaol, to take his trial for felony, and the prosecutor and witnesses bound over in recognizances to prosecute and give evidence. That the plaintiff remained in custody, among felons, until the Epiphany Sessions, which were held in January, 1828, being three months from the date of the commitment, when he was discharged upon application to the Court, a compromise having been entered into between him and *Balls*, the prosecutor. It was admitted by the plaintiff's counsel, that no malice was imputable to the defendant; but it was contended, that he had been guilty of an error in judgment, and that the plaintiff was entitled to recover a compensation in damages for the imprisonment he had suffered in consequence of his commitment.

The defendant called no witnesses, but it was submitted for him, that this action could not be maintained, on the ground that the offence with which the plaintiff was charged was a felony by virtue of the statute 7 & 8 Geo. 4, c. 30, s. 19(a), and that the magistrates had, for

(a) By which it is enacted—  
“That if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any

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anything that appeared on the face of the depositions, full power and authority to commit the plaintiff; and, as there was no proof of malice by the defendant, he could only be charged with an error in judgment, for which he could not be liable to the plaintiff in this action.

It was also objected for the defendant that the plaintiff had not complied with the directions of the statute 22 Geo. 2, c. 44, which was passed for the purpose of rendering justices of the peace more safe in the execution of their office, and which enacts, that, "at the back of all notices against magistrates, the name and place of abode of the plaintiff's attorney or agent must be indorsed."

The notice of action to the defendant was signed at the foot by the plaintiff's attorney, and it was contended that his place of abode was not correctly stated: Half Moon Street, Piccadilly, being described as in London, instead of the county of Middlesex.

The learned judge proposed, either to direct a verdict to be entered for the plaintiff, reserving leave to the defendant to move to enter a nonsuit; or to nonsuit the plaintiff, with liberty for him to move that

park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house, every such offender (in case the amount of the injury done shall exceed the sum of 1*l.*), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if any person shall unlawfully and maliciously cut, break, bark, root

up, or otherwise destroy or damage the whole, or any part of any tree, sapling, or shrub, or any underwood, respectively growing elsewhere than in any of the situations hereinbefore mentioned, every such offender (in case the amount of the injury done shall exceed the sum of 5*l.*), shall be guilty of felony; and, being convicted thereof, shall be liable to any of the punishments which the Court may award for the felony hereinbefore last mentioned."

a verdict might be entered in his favour: but, upon the defendant's counsel pressing for a nonsuit, the learned judge proposed, with a view of saving the parties the expense of a second trial, that the jury should then decide upon the quantum of damages to which the plaintiff might be entitled in case the Court should be of opinion that the action was maintainable; whereupon, the defendant's counsel addressed the jury, and contended that the defendant was not only fully justified in what he had done, but that he would have been guilty of a dereliction of duty if he had not committed the plaintiff on the information laid by *Balls*, and the depositions in support of it, inasmuch as the statute constituted the alleged offence a felony.

The jury having found a verdict for the plaintiff, damages one farthing, a nonsuit was directed to be entered, leave being reserved to the plaintiff to move the Court to set it aside, and that a verdict might be entered for him for the amount of the damages found by the jury.

*Storks*, Serjt., in the last term, accordingly obtained a rule nisi, and in addition to the objections raised for the plaintiff at the trial, submitted that there was no ground whatever to commit the plaintiff for a felony, as it appeared on the face of the depositions, that the tree alleged to have been cut down stood on premises in the occupation of the plaintiff; and the legislature did not intend, or even contemplate, that the statute 7 & 8 *Geo.* 4, should apply to a case of landlord and tenant, or to a person in the actual occupation of premises, unless it were shewn that the tree cut down was expressly excepted by a clause in the demise; and here the defendant must or ought to have been aware that the plaintiff could not have committed a wilful

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trespass within the meaning of the act; and, as he caused him to be committed without any colourable ground for so doing, he was liable to the plaintiff for the injury he sustained by so long and unjustifiable an imprisonment.

*Wilde and Russell*, Serjts., now shewed cause.—The first, and indeed the only material question which arises in this case is, whether, under the circumstances, any error of judgment is imputable to the defendant, or whether he has put a misconstruction on the 19th section of the statute 7 & 8 Geo. 4, c. 30, the provisions of which were substituted for the black act, 9 Geo. 1, c. 22, s. 1, which made the offence capital, where the malice was personal to the owner, and the 6 Geo. 3, c. 36, and 6 Geo. 3, c. 48; by the first of which, if the offence were committed in the night time, it was felony; and, by the last, if done at any other time, it was punishable by summary conviction, for the first and second offences. The present case clearly falls within the operation and meaning of the statute 7 & 8 Geo. 4; for the word “*maliciously*” cannot have a different signification than it had under the statute 6 Geo. 3, c. 36, upon which it was considered as bearing its most general signification, and applying to an act done *malò animo* from an original desire of gain, or a careless indifference of mischief(a). Malice, in a legal sense, does not signify, according to its common acceptation, a desire of revenge, or a settled anger against a particular person. It does not appear what interest the plaintiff had in the premises on which the tree was cut down; but even if there were an existing tenancy, it would not divest the magistrate of his jurisdiction. The plaintiff had clearly been guilty of a

(a) East's Pleas of the Crown, Vol. 2, 1062.

wrongful act against the person who had the right of property in the tree, and he offered no excuse before the magistrates for having cut it down. Felony may be committed in respect of demised property, as in arson, under the statutes, though not at common law; and in larceny of chattels and fixtures let to tenants and lodgers, by the statute 7 & 8 Geo. 4, c. 29, s. 45. Suppose valuable or ornamental trees, for instance an avenue, to have been cut down maliciously by a tenant or occupier, it is quite clear that it would fall within the meaning and spirit of the act, and that he would be liable to be punished accordingly. Enough, therefore, appeared on the face of the information and depositions to lead the magistrates to suppose that they had jurisdiction to commit the plaintiff for the offence with which he was charged, and it was not for them to decide on the law, as they were merely authorised to commit. But, even if the defendant, acting in his official character as a magistrate, has been guilty of an error in judgment, he is not liable to an action; for in *Hawkins's Pleas of the Crown* it is said (a), "Justices of the peace are not punishable civilly for acts done by them in their judicial capacities; but, if they abuse the authority with which they are entrusted, they may be punished criminally at the suit of the king, by way of information. But, in cases where they proceed ministerially rather than judicially, if they act corruptly, they are liable to an action at the suit of the party, as well as to an information at the suit of the king." Again, it is said (b), "Perhaps there may be this difference between the warrant of a justice of the peace for such causes which he has not authority to hear and determine as

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(a) Book 2, c. 8, XVII. s. 74,  
 8th edit. by Curwood.

(b) Hawk. P. C. Book 2. c. 13,  
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judge, without the concurrence of others, and such warrant for an offence which he may so determine without the concurrence of any other; that, in the former case, inasmuch as he rather proceeds ministerially than judicially, *if he act corruptly*, he is liable to an action at the suit of the party, as well as to an information at the suit of the king; but, in the latter case, he is punished only at the suit of the king; for that, regularly, no man is liable to an action for what he doth as judge." At all events, there must be either malice or a corrupt motive imputable to a magistrate, to make him liable to an action. In *Windham v. Clere(a)*, an action on the case was brought against the defendant as a justice of the peace, for maliciously issuing his warrant, in which it was alleged that the plaintiff was accused of stealing a horse, whereas, in truth, the plaintiff never was accused, nor did he steal the horse, and the defendant knew him to be guiltless. The plaintiff had a verdict. *Clench, J.*, and *Gawdy, J.*, held that the action was maintainable, and they said, "If a man *be accused* to a justice of the peace for an offence, for which he causeth him to be committed by his warrant, although the accusation be false, yet he is excusable; but if the party be *never accused*, but the justice, of his malice and his own head, cause him to be arrested, it is otherwise." *Morgan v. Hughes(b)*, is an authority to shew that where a justice *maliciously* grants a warrant against a person *without* any information, upon a supposed charge of felony, an action of trespass will lie; but no case can be found where such action has been attempted to be brought without an imputation of corrupt motives or malicious intent. In *Lowther v. the Earl of Radnor(c)*, it was held, that trespass does not lie against justices of the peace acting

(a) Cro. Eliz. 130; S. C. 1 Leon. 187.

(b) 2 T. R. 225.

(c) 8 East, 113.



upon a complaint made to them upon oath, by the terms of which they have jurisdiction, although the real facts of the case might not have supported such complaint, *if such facts* were not laid before them *at the time*.

With respect to the objection which has been raised as to the sufficiency of the notice, it must be precise in terms; and the statute by which it is required, has always received a strict construction. In *Lovelace v. Curry*, Mr. Justice *Lawrence* said (a), "that the Court decided in *Taylor v. Fenwick*, that the statute has prescribed a form which must be implicitly followed, and it admits of no equivalent. The statute was made to introduce a strictness of form in favour of justice, and it must be observed literally." But the case of *Stears v. Smith* (b) is expressly in point. That was an action of trespass against a magistrate for breaking and entering the plaintiff's house, and searching it without authority, and injuring his goods. The plaintiff gave in evidence a notice pursuant to the statute, and in which the plaintiff's attorney was described as of New Inn, London; and it being objected for the defendant (it having been ascertained that the residence of the plaintiff's attorney was New Inn, near St. Clement's, in the Strand,) that New Inn was in Westminster, and not in London, and, therefore, that it was a misdescription of the attorney's residence: Lord *Ellenborough* held the objection to be sufficient, and the plaintiff was nonsuited. Half Moon Street, Piccadilly, is in the county of Middlesex, and not in London; and in *Aked v. Stocks*, which was an action against two magistrates, for unlawfully convicting the plaintiff, and there was a variance in the warrant as set out in the notice, *Park, J.*, said (c), "these notices have always received a strict construction." And,

(a) 7 T. R. 635. (b) 6 Esp. Rep. 138. (c) 1 Moore & Payne, 352.

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although in *Ditcham v. Chivis* (a), it was contended that the word London was not to be confined to the city of London; yet, that was the case of a contract by a coach proprietor, to carry passengers from London to Blackheath, and the word London was painted on the coach, which was licensed to run from Charing Cross to Greenwich and Blackheath and back again.

*Storks*, Serjt, in support of his rule. Although no corrupt motive or personal malice may be imputable to the defendant, yet the plaintiff is entitled to recover damages for the injury he has sustained by his commitment and incarceration in gaol; and, as he was the tenant or *occupier* of the estate on which the tree was cut down, he could not even be deemed a trespasser, much less to have committed a wilful trespass; and, if so, it is quite clear that the defendant had no jurisdiction or authority to commit him. Besides, it appears on the face of the depositions, that the premises were occupied by the plaintiff, and the deposition of *Storkey*, a labourer, was framed according to the precise words of the act. It must therefore be assumed, that it was drawn up by the magistrate's clerk, without any regard to what fell from the witness at the time; and, if the defendant had read the depositions, he would necessarily have seen that the plaintiff had not been guilty of an offence within the meaning or spirit of the act. In *Crepps v. Durden* (b), it was held, that a person can commit but one offence on the same day by exercising his ordinary calling on Sunday, contrary to the statute 29 Car. 2, c. 7, and that a magistrate having convicted a party in more than one penalty for the same day, it was *an excess* of jurisdiction, for which he was liable in an action of trespass. That case is far stronger than the present, as

(a) 1 Moore &amp; Payne, 735.

(b) Cowp. 640.

here the defendant acted without jurisdiction; and the statute 7 & 8 Geo. 4, must receive a strict construction, as it gives magistrates new and extensive powers, and operates in restraint of the liberty of the subject. In *Davis v. Capper* (a), the plaintiff, a respectable female, brought trespass against the defendant, a magistrate, for having committed her to prison for sixteen days, on a charge of theft, of which she was innocent; and *Gaselee, J.*, who tried the cause, having directed a nonsuit, on the ground that the defendant was warranted as a magistrate in committing the plaintiff, the Court of King's Bench, after argument, directed a new trial.

With respect to the notice, the object of the legislature in passing the statute 24 Geo. 2, was, that the magistrate or party sued should have due notice of the residence of the plaintiff's attorney, in order that he might tender amends if he thought fit so to do. In common parlance, the word London applies to the suburbs or environs, as well as to the city itself; and Piccadilly, London, was less likely to mislead than Piccadilly, Middlesex. The case of *Stears v. Smith*, is a mere nisi prius decision; and in *Greenway v. Hurd*, Lord Kenyon said (b), "it has been frequently observed by the Courts, that the notice which is directed to be given to justices and other officers, before actions are brought against them, is of no use to them, where they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases, where they intended to act within it, but, by mistake, exceeded it." In *Crook v. Curry* (c), Mr. Baron Thompson held, that the attorney's

(a). 10 B. & C. 28, where it was held that trespass would lie against a magistrate for committing a party, charged with felony, for re-examination for an unreasonable time, though done with-

out any improper motive. And see *Davis v. Russell*, ante, 226.

(b) 4 T. R. 555.

(c) Burn's Justice, 24th edit. by Chetw. vol. 3, 171.

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name and place of abode being in the body instead of on the back of the notice was sufficient, on the ground of the intent of the statute being that the magistrate might be enabled to tender amends to the party or his attorney, and that if the attorney giving the notice described himself generally of the town in which he resided, viz. as of Bolton en le Moor, it was sufficient. So, in *Osborn v. Gough*(a), where the place of abode of the plaintiff's attorney was described as "of Birmingham," it was deemed sufficient; and Lord Chief Justice *Alvanley* said, "the interpretation which I put upon the statute is this, that if the place indorsed upon the notice be the true place of the attorney's abode, it lies on the defendant to shew that such description has not afforded him the opportunity of taking advantage of the act of parliament:" and here, Half Moon Street, Piccadilly, would have been a sufficient notice, without the addition of the word London; but even if it were not, it is a more appropriate address than Piccadilly, Middlesex.

TINDAL, C. J.—I am of opinion that this rule must be discharged. The plaintiff has charged the defendant, a magistrate, with trespass and false imprisonment, for having committed him to gaol, to take his trial before justices at sessions for an offence alleged to have been committed by him, which, if substantiated, would have amounted to felony; and the only question is, whether, under the circumstances, the defendant, as such magistrate, had jurisdiction to investigate the charge, and, having done so, to commit the plaintiff to prison. The information charges the plaintiff with having committed a felonious offence within the terms of the statute 7 & 8 *Geo.* 4, c. 30, viz. with having wilfully and maliciously cut, broken, barked,

(a) 3 Bos. & Pul. 550.

rooted up, or otherwise destroyed, a timber tree, growing in a yard belonging to a dwelling-house, of the value of 1*l.* and upwards, the property of Dr. *Baddeley*. A specific punishment is pointed out by the statute for an offence of this description, viz. transportation or imprisonment. The question then is, whether, on a charge being made of a distinct and substantive felony, the magistrate is liable as a trespasser, or answerable for the correctness of the charge, if the case be disposed of, as in other instances, where the magistrate is called upon to act. It would be a most dangerous doctrine to hold that he would be liable in such a case; and it would also be against the current of authorities. The statute does not give the magistrate an exclusive jurisdiction or power to convict, but merely to commit the party for trial, in case the charge alleged against him should be substantiated or made out on oath. The case of *Windham v. Clere* appears to me to be in point, and according to the report in *Croke Elizabeth, Clench, J., and Gaudy, J.*, said, that (a), "if a man be accused to a justice of the peace for an offence, for which he causeth him to be arrested by his warrant, although the accusation be false, yet he is excusable." Unquestionably, the charge does not appear to have been made in the regular course, as the depositions of the party who came before the defendant to substantiate the alleged charge were framed in the precise words of the statute, which could not have been the language of the witnesses. But that alone will not make the defendant's conduct malicious. It has been said, however, that as it appeared on the face of the depositions that the plaintiff was the occupier of the premises on which the tree was cut down, it necessarily took the case out of the statute, and ousted the magistrate of his jurisdiction. To that proposition,

(a) Cro. Eliz. 130.

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however, I cannot accede. If trees growing on a farm are reserved to the lessor, or are expressly excepted in a lease, and the tenant cut them down, he would clearly be a trespasser, although he might not be guilty of waste, as they did not form the subject-matter of demise. If, therefore, the tenant or occupier would be liable in trespass, I am not prepared to say that he might not be criminally answerable, as the nature of the offence might, in a great measure, depend on the intent manifested at the time of cutting down the tree. But, in the view I take of this case, it is not necessary to decide that point, for the plaintiff was directly charged with an offence within the terms of the statute, and over which the magistrate had jurisdiction. The offence might, and, for anything that appears to the contrary, was committed; and when the plaintiff was brought before the defendant, he was to exercise his own judgment on the case, and is not liable for a mere error in judgment; and as he had jurisdiction to commit, he is not liable in this action. This case may be distinguished from *Crepps v. Durden*, as there the magistrate, having convicted for one penalty, had no jurisdiction; he was *functus officio*, as the party could only be convicted in one penalty, although he had committed divers offences on the same day. Here, however, the defendant had jurisdiction; and unless the plaintiff had shewn that he had acted from a malignant motive in committing him, or from a malicious feeling towards him, he ought not to be liable in this action. I decline expressing any opinion as to the sufficiency of the notice, as on the main question this rule must be discharged.

PARK, J.—I am of the same opinion. A magistrate, acting as such, under a statute giving him jurisdiction, is not liable to an action of trespass, unless he exceed his jurisdiction. Here the statute consti-

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tuted the offence with which the plaintiff was charged, a felony, and when he was brought before the magistrate he had jurisdiction to commit him; and, according to *Sir Edward Clere's* case, which appears to have come under the consideration of all the judges, the defendant would be excusable in committing the plaintiff, although the accusation should turn out to be false. Here no imputation has been attempted to be cast on the defendant, and there can be doubt but that he acted *bonâ fide*, and in the due discharge of his duty. The case of *Crepps v. Durden* is distinguishable from the present on the ground stated by my Lord Chief Justice, as the magistrate *having convicted* in one penalty had no jurisdiction to convict for others. This case embraces one subject of general importance to magistrates and their clerks. The practice of framing depositions in the words of a clause in an act of parliament cannot be too highly reprobated (*a*); and here the witness *Storkey*, a husbandman and marksman, is stated to have deposed, that he saw the plaintiff wilfully and maliciously cutting, breaking, barking, rooting up, and destroying a tree, in the very words of the act. Still that does not render the defendant liable, as he had the depositions before him, which contained a charge authorising him to commit the plaintiff to gaol to take his trial for the alleged offence at the ensuing sessions of the peace.

BURROUGH, J.—It is quite clear that if a magistrate has jurisdiction, as the defendant had in this case, he cannot be liable in an action of trespass, nor in any form of action, for a mere mistake in a matter of law. The statute 7 & 8 Geo. 4, describes the nature of

(a) See *Cohen v. Morgan*, 3 D. & R. M. C. 320, where Lord Tenterden said, "It is the duty of the justice's clerk to write down in the information what a witness says, as nearly as possi-

ble in the language used by the party, and not to frame the deposition in language in which no person, in common parlance, can be supposed to express himself."

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the offence which gave the magistrate jurisdiction, and the information of the party, as well as the depositions establishing the charge against the plaintiff, fell expressly within the terms and meaning of the act. Whether a party in the *occupation* of premises could be deemed guilty of felony for cutting down a tree growing thereon, was a question of law and not of fact, and the act was deposed to. I fully agree with the Court in thinking, that it is highly improper to frame depositions in the terms of a statute, and the magistrates should be answerable for the acts of their clerks; for the depositions should contain not only the language of the witnesses, but all the material facts to which they depose. But, although a magistrate may be answerable for the misconduct of his clerk, the defendant is not liable in this form of action. If the plaintiff had brought a special action on the case the sequel might have been different. On that, however, I do not now feel it necessary to express an opinion, as I agree with the Court in thinking that this rule must be discharged.

GASELEE, J.—I regret that I feel myself compelled to concur in the opinion expressed by my Lord Chief Justice and my two learned brothers that this action cannot be maintained. The words of the statute under which the plaintiff was committed are general, and not limited or confined to persons in relative situations of life, but extend to the public at large; nor does the act contain any exception as to malicious injuries committed by tenants or occupiers against their landlords; for the words are—"if *any person* shall unlawfully and maliciously cut, destroy, or damage the whole or any part of any tree, growing in any ground adjoining or belonging to a dwelling house, if the injury done shall exceed 1*l.*, he shall be guilty of felony." The defendant acted on his general authority as a magistrate, and, by virtue



of the statute, he was empowered to inquire whether the offence with which the plaintiff was charged would justify his commitment. The party making the information alleged that the plaintiff had been guilty of an offence directly within the terms of the statute, viz. of having wilfully and maliciously destroyed a tree, contrary to the statute; and if there was a probability that the act done amounted to a felony, the defendant was bound to commit, as in an ordinary case. If the plaintiff had been charged on a suspicion of having committed murder, and it should eventually turn out that no murder had been committed, or that it was committed by another, the magistrate would not be liable in trespass for having caused the accused party to be committed to take his trial for the crime imputed to him. The case of *Crepps v. Durden* is distinguishable, as there the magistrate had a power not only to investigate the nature of the complaint, but to *convict* the party charged with the offence; and having convicted, his jurisdiction ceased, as the party had only incurred one penalty, although he had committed divers offences on the same day. Here, however, the defendant had jurisdiction to inquire into the nature of the offence with which the plaintiff was charged, and, by the terms of the information and depositions in its support, it fell expressly within the terms of the statute. Although I entertain a very strong opinion with regard to the objection which has been raised as to the sufficiency of the notice, it is unnecessary now to express it. The case of *Stears v. Smith*, although only a nisi prius decision, was determined by Lord *Ellenborough*, who nonsuited the plaintiff, and it does not appear that any application was afterwards made to the Court to set it aside. But, on the other ground, I concur with the Court in thinking that this rule must be

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WALSH Bart. and Another, Executors of Sir HENRY  
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A covenant by lessee with lessor, his heirs and assigns, to indemnify the overseers for the time being of the parish in which the demised premises are situate, from all costs and charges by reason of lessee's taking an apprentice, or servant, who may thereby gain a settlement within, or become chargeable to the parish, is valid. Such a covenant is personal and does not run with the land, and lessor's executor may maintain an action for a breach of it.

**THIS** was an action of covenant by the executors of *Sir Henry Strachey*, deceased. The declaration stated, that heretofore, and in the lifetime of *Sir Henry Strachey*, to wit, on the 12th March, 1792, at the parish of Elm, in the county of Somerset, by a certain indenture then and there made between the said *Sir Henry* of the one part, and the defendant of the other part; the said *Sir Henry*, for the consideration therein mentioned, did demise, lease, and to farm let, unto the defendant, his executors, administrators, and assigns, all that remaining part of a messuage or dwelling-house, with the mill, stable, and garden thereto adjoining and belonging, called Curtis's Mill, situate and being within the parish of Elm, in the said county of Somerset, and of which the said *Sir Henry* was seised in his demesne as of fee, together with all out-houses, ways, waters, &c. and appurtenances whatsoever, to the said remaining part of the said messuage or dwelling-house, mill, and premises belonging or in anywise appertaining: To have and to hold the same to the defendant for a certain term, as in the said indenture mentioned, which said term is yet unexpired. And the defendant, for himself, his executors, administrators, and assigns, did, in and by the said indenture, in another part thereof, covenant, promise, and grant to and with the said *Sir Henry*, his heirs and assigns, amongst other things, that he, the defendant, his executors, administrators, or assigns, should and would, from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm aforesaid, for the time being, and all and singular other the owners

and occupiers of lands and tenements, and the inhabitants of or within the parish of Elm aforesaid, for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for, or by reason or means of the defendant, his executors, administrators, or assigns, taking an apprentice or servant, who should thereby gain a settlement within, or become chargeable to the parish of Elm aforesaid;—as, by the said indenture (reference being thereunto had) will (amongst other things) more fully and at large appear. By virtue of which said demise, the defendant entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof.—The plaintiffs then, after alleging performance of all the covenants in the indenture, by the said Sir *Henry*, in his lifetime, to be performed, fulfilled, and kept;—assigned for breach, that the defendant did not, nor would, from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm aforesaid, for the time being, and all and singular other the owners and occupiers of lands and tenements, and the inhabitants of or within the parish of Elm aforesaid, for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for or by reason or means of the defendant, his executors, administrators, or assigns, taking an apprentice or servant who should thereby gain a settlement within, or become chargeable to the parish of Elm; but, on the contrary thereof, he the defendant, after the making of the said indenture, and after the death of the said Sir *Henry*, and during the continuance of the said term, to wit, on the 1st December, 1826, took a certain servant, to wit, one *William Lansdown*, within the true intent and meaning of the said indenture; and the said *William Lansdown*,

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by reason of his being such servant to the defendant, did gain a settlement within the parish of Elm aforesaid, and within the true intent and meaning of the said indenture, to wit, in the parish aforesaid, in the county aforesaid. The plaintiffs then averred, that the said *William Lansdown*, having so gained such settlement as aforesaid, did afterwards, to wit, on the 14th February, 1827, by reason of the premises, become chargeable to the said parish;— and the overseers of the poor of the parish aforesaid for the time being, by reason thereof, as such overseers as aforesaid, were heretofore, to wit, on the day and year last aforesaid, and on divers other days and times between that day and the commencement of this suit, forced and obliged to, and did necessarily pay, lay out, and expend, divers large sums of money, amounting in the whole to a large sum, to wit, to the sum of 100*l.*, in and about the necessary support, maintenance, and sustaining the said *William Lansdown* and his family, to wit, at the parish aforesaid, in the county aforesaid.

To this declaration the defendant pleaded seven pleas in bar; the first six concluding to the country, and on which issues were joined. In the last, the defendant alleged, that the plaintiffs, executors as aforesaid, had not, at any time since the making of the said indenture hitherto, been in anywise damnified, by reason or means of any matter, cause, or thing in the said indenture mentioned. And this, &c. wherefore, &c.

To this plea, the plaintiffs, executors as aforesaid, demurred specially, and assigned for causes, that the defendant had, in and by his said plea, attempted to put in issue, to be tried by a jury, a question of law, and not of fact; and also, for that the defendant, in and by his said plea, did not plead or set forth any fact, matter, or thing, which is any bar to the declaration of the plaintiffs. And, that the defendant, in and by his said plea, con-

feased the declaration of the plaintiffs, and the matters therein contained, but did not in any manner avoid the same. And also, for that the plea was wholly repugnant, and in other respects uncertain, informal, and insufficient, &c. The defendant joined in demurrer.

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*Wilde*, Serjt., for the plaintiffs. The plea demurred to is bad in substance, because it admits a breach of covenant, but denies that any damage has actually accrued; whereas, damage is a legal consequence of the breach of covenant. But the defendant insists, that the covenant on which the action is founded, as set out in the declaration, is illegal and void. The action is well brought by the plaintiffs, as executors of Sir *Henry Strachey*, the lessor, as the covenant in question is a personal covenant, and does not run with the land, according to the distinction laid down in *Spencer's* case (*a*), between collateral covenants and such as run with the land;—the latter must be such as affect the demised land itself, and not merely the collateral interest of the lessor; and that principle was recognized and established in *Bally v. Walls* (*b*), which shews that a prejudice to the reversioner need not be certain, nor is it necessary that it should arise during the term. The covenant does not prohibit the defendant from employing apprentices or servants, but is merely a covenant requiring him to indemnify the parish against any costs the overseers might be put to by reason of the defendant's taking an apprentice or servant, who should thereby gain a settlement, or become chargeable to the parish. It must be assumed that the defendant entered into the covenant voluntarily, and that he knew its purport and effect at the time the indenture was executed, and there is nothing to prevent

(*a*) 5 Co. Rep. 16 a.

(*b*) 3 Wils. 25.

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poor persons from being employed by him in the parish of Elm. In the case of the Mayor of *Congleton v. Pattison* (a), where, in a lease of land, with liberty to make a water-course and erect a mill, the lessee covenanted for himself, his executors, administrators, and assigns, not to hire persons to work in the mill, who were settled in other parishes, without a parish certificate; it was held that the covenant did not run with the land or bind the assignee of the lessee. Although the argument and judgment of the Court were confined to that point, yet that case is an express authority to shew, that a covenant to bear a burthen occasioned by the introduction of a manufactory into a parish is valid, as it does not operate in restraint of trade. But, it may be said, that the covenant in question is an unreasonable covenant, and against the policy of the poor laws; as, by the defendant's indemnifying the parish officers, it took away from them all motives of economy, and was injurious to the due regulation and management of the poor. But, the defendant might have engaged labourers and servants, and employed them in the mill and premises demised, without making them chargeable to the parish or conferring settlements upon them. The only onus the lessor intended to throw on the defendant at the time of his contracting for the lease was, that the parish in which the premises were situate should not be burthened with additional poor; and the lessor was seised of lands within the parish besides those demised to the defendant; and as it is alleged in the declaration that the plaintiff was seised in fee of the premises in question, it was unnecessary to aver or shew that he was the occupier; for, in *Bullard v. Harrison*, where, in trespass, the defendant pleaded two special pleas of justification, prescribing

(a) 10 East, 130.

for a right of way, Lord *Ellenborough* said (a), "This record is full of a vast number of purient novelties in pleading, and there is one that has not been touched upon in argument. For what is alleged in these pleas, that the defendant is seised in fee, and also in the occupation of the farm, every pleader knows is not usual nor necessary; for the alleging a seisin in fee virtually includes an occupation, unless the contrary be shewn." It must be assumed, that the defendant obtained the premises at a reduced rent in consideration of the covenant in question, and it was only to indemnify the parish against his own acts; and if he had covenanted to contribute personally to the relief and maintenance of the poor of the parish, it would be a good covenant. Although a covenant in general restraint of trade is illegal and void, yet, if there be a mere partial restraint, and founded on an adequate consideration, it is a sufficient answer to the objection; and here the consideration was the beneficial occupation, and there is consequently nothing unreasonable in it. In the case of *The King v. The Inhabitants of Mursley*, *Buller, J.*, said (b), "The master may, if he please, hire a servant for a less time than a year, for the express purpose of preventing his gaining a settlement;" and *Grose, J.*, concurred in that opinion. A security given to overseers to indemnify the parish against charges to which they may be subject by the birth of an illegitimate child, is good, according to the case of *Cole v. Gower* (c). Every pauper must have a place of settlement; and, as he is entitled to relief in the parish in which he derives a settlement, the mere circumstance of locality is immaterial; and here the defendant was not restrained from employing the poor in the parish in which the premises were situate,

(a) 4 *Mau. & Selw.* 392. (b) 1 *Term Rep.* 395. (c) 6 *East*, 110.

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and the only burthen cast upon him was, that he should indemnify the parish against the expenses of those persons who should become chargeable by his own acts, and he might have any number of apprentices or servants he pleased, and employ them on the demised premises, without their gaining a settlement, or becoming chargeable to the parish.

*Stephen*, Serjt., for the defendant. The covenant declared on is illegal and void on three grounds:—first, as being in restraint of trade; secondly, because it is unreasonable; and lastly, as being contrary to the general policy of the poor laws. First, it has long been an established principle, that all stipulations or contracts in restraint of trade are illegal and void, as they are against the benefit of the commonwealth; and, according to the case of *Colgate v. Bachelor* (a), it is not necessary that there should be an absolute prohibition or restraint, for if a party be abridged of his trade and living, it is sufficient. It therefore follows, that a covenant which tends to the general discouragement of trade, is void; and a particular or partial restraint is illegal, unless it be founded on an adequate consideration. In *Hartly v. Rice* (b), it was held, that a contract tending to discourage marriage was illegal, as being against the sound policy of the law; and Lord *Ellenborough* said, “We have no scales to weigh the degree of effect it would have on the human mind; the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract.” But the leading case on this subject is that of *Mitchel v. Reynolds* (c), where it was resolved by the Court, after several arguments at the bar, that general restraints of trade, whether by bond, covenant, or promise, either

(a) Cro. Eliz. 872. (b) 10 East, 22. (c) 1 P. Wms. 181.



with or without consideration, are void, and that particular restraints, without consideration, are also void; and that if the consideration does not appear so as to make the contract reasonable and useful, a Court of law will presume that it is not valid; on the grounds, that it is not only of no benefit to the party bound, but a general mischief to the public. Here, although the covenant is not in terms in general restraint of trade, yet it tends to that end, as it prohibits the defendant from employing servants within the parish where the premises are situate. The principles established in *Mitchel v. Reynolds* have been since recognized and adopted, particularly in the late case of *Homer v. Ashford* (a), where all the previous authorities were referred to and considered. There, however, the Court were of opinion that the deed, as set out in the declaration, disclosed a sufficient legal consideration, and also that it was a reasonable consideration. But secondly, the covenant in question is unreasonable. It imposes upon the defendant a liability for a term of unlimited duration, it not being restricted to the term demised nor confined to the lifetime of the parties, as the defendant covenanted for himself, his executors, administrators, and assigns, with the lessor, his heirs, and assigns. Besides, the lessor cannot prescribe a particular mode in which a lessee is to carry on his business, or the servants he may chuse to employ, or the parishes or districts from which they may be engaged. Lastly, the covenant is void, as being against the policy of the poor laws. Although it was decided in the case of *The King v. Mursley*, that a master may hire a servant for a less period than a year to prevent his gaining a settlement, yet here the breach assigned is, that the defendant took a servant, who thereby gained a settlement within, and became chargeable to the parish, and even if

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(a) 11 B. Moore, 91.

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he had employed casual poor, he would have been liable for a breach of covenant. The covenant is not founded on a good or sufficient consideration; it tends to prohibit the defendant from employing as many servants as he otherwise would, by which the parish would be relieved from the burthen of maintaining such paupers as might enter into the defendant's service; besides which it is highly prejudicial to the labouring classes; and *Blackstone*, J., after enumerating the different modes by which settlements may be acquired, and, referring to hiring, service, and apprenticeship, says (a), "This is meant to encourage application to trades, and going out to reputable services." The covenant in question would frustrate that object, as it would prevent the defendant from hiring servants from other parishes or districts, which would be highly injurious to them; besides which it would hold out an inducement to the overseers of the parish of Elm to dispose of the funds appropriated to the relief of the poor in prodigality and waste, which is decidedly contrary to the object of the poor laws, and the office and duty of the overseers; and *Blackstone*, J., says, (b): "The two great objects of the statute 43 *Eliz.* c. 2, by which overseers are appointed, are—first, to relieve the impotent poor; and secondly, to find employment for such as are able to work, and this principally by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common workhouse;" and here the defendant would have found them employment, but for the prohibitory covenant in the lease.

But even if the covenant be not void on either of these grounds, the action is improperly brought by the plaintiffs, as executors of the lessor, and therefore the declaration cannot be supported. It being alleged that

(a) Vol. i. 364.

(b) Ibid. 360-1.

the testator was seised in fee, and the covenant being made to him and his heirs, the action should have been brought by the heir or party beneficially entitled, who would be entitled to damages for a breach of the covenant, which affects the value of the land demised; and it does not follow that the interest descends to the executors or personal representatives of the deceased. The premises might have been assigned to a stranger, during the lifetime of the lessor, and although it is alleged that he was seised in fee, it does not appear that he was the occupier; and if not, he could not be liable to the payment of poor rates, or be chargeable to the relief of the poor. The plaintiffs, therefore, must be considered as strangers in point of interest; and although, in the *Mayor of Congleton v. Pattison*, it was held that those covenants alone which tend directly, and not merely through the intervention of collateral causes, to improve the estate, run with the land; yet here, as was said in the argument in that case, the question is blended with the general policy of the country, which may be affected by a stipulation not to employ servants out of other parishes or districts.

*Wilde*, Serjt., in reply. Although it has been mainly contended that the covenant is void, its tendency being in restraint of trade, and the opinion of *Blackstone*, J. has been relied on in support of that objection, who says (a), "That the practice of accumulating all the poor in one common work-house, puts the sober and diligent upon a level with those who are dissolute and idle;" yet, if such work-houses were not established, the increase of poor rates would be incalculable. The defendant could not carry on his trade, unless he occupied the premises demised; and if he took them in the expectation of its being a beneficial occupation, he must

(a) 1 Bl. Com. 361.

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also be subject to the restrictions imposed on him by the terms of the lease. The Court will presume that there was a reasonable consideration for the defendant's entering into the covenant, as in *Homer v. Ashford*. There is nothing to shew that any inconvenience or injury will result to the public from the introduction of the covenant, as it is confined to the indemnifying the parish against any paupers which the lessee might cause to become chargeable. It therefore depended on his acts alone, and he might employ poor within the parish in such a manner as not to entitle them to gain a settlement by such service. Although it is said that the action is improperly brought by the executors of the lessor, yet there is no weight in the objection, as the covenant is a personal covenant, and does not run with the land; and as the contract was made for the personal benefit of the testator, his executors are entitled to sue for a breach of it after his death. Again, it has been urged that the covenant has a tendency to induce the overseers of the poor to misapply the funds which are raised for their support; yet that is a remote circumstance, and it is not to be assumed that it would induce the parish officers to be guilty of a breach of duty. A question nearly similar to the present was brought before the Court of King's Bench, in the case of *Hill v. Eastaff* (a), on demurrer to a covenant contained in the condition of a bond given by the overseers of one parish to the overseers of another, to indemnify the latter from all costs which might be incurred by them, by reason of a person having apprenticed himself to a parishioner, and who might thereby become chargeable to the parish, and none of the objections now raised were resorted to in that case, and the Court held the covenant to be binding.

*Cur. adv. vult.*

(a) See 3 Moore &amp; Payne, 470.

TINDAL, C. J., now delivered the judgment of the Court as follows:—

The plaintiffs declared in covenant, as executors of Sir *Henry Strachey*, upon an indenture of demise, bearing date the 12th March, 1792, and made between the said Sir *Henry* of the one part, and the defendant of the other part; by which certain premises in the parish of Elm were demised to the defendant, for a term not yet expired, and the indenture contained a covenant, by which the defendant, for himself, his executors, administrators, and assigns, did, in and by the said indenture, covenant, promise, and grant to and with the said Sir *Henry*, his heirs and assigns (amongst other things), that he, the defendant, his executors, administrators, or assigns, should and would, from time to time, and at all times thereafter, fully and clearly indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm for the time being, and all and singular other owners and occupiers of lands and tenements, and the inhabitants of or within the parish of Elm for the time being, of and from all manner of costs, rates, taxes, assessments, and charges whatsoever, for or by reason or means of the defendant, his executors, administrators, or assigns, taking an apprentice or servant, who should thereby gain a settlement within, or become chargeable to, the parish of Elm aforesaid; and then assigned as a *breach* that the defendant would not indemnify and save harmless the churchwardens and overseers of the poor of the parish of Elm, from all costs by reason of his taking an apprentice or servant, who should thereby gain a settlement: but on the contrary thereof, he, the defendant, after the making of the said indenture, and after the death of the said Sir *Henry*, and during the continuance of the said term, to wit, on the 1st December, 1826, took a certain servant, to wit, one

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*William Lansdown*, within the true intent and meaning of the said indenture; and the said *William Lansdown*, by reason of his being such servant to the defendant, did gain a settlement within the parish of Elm aforesaid, and within the true intent and meaning of the said indenture, to wit, in the parish aforesaid, in the county aforesaid, and, having gained such settlement, became chargeable to the parish of Elm.

The defendant pleaded several pleas in bar, to the last of which there was a demurrer and joinder; and the question which ultimately arose was, whether the covenant was a valid covenant in law. It was contended on the part of the defendant—First, that the plaintiffs had no interest which could authorise them to maintain an action; and secondly, that the covenant was void, on the grounds that it was unreasonable; that it was in restraint of trade, and against the policy of the poor laws; inasmuch as it took away from the overseers any reason for economy, and was injurious to the poor themselves; but we do not think that any of the objections are maintainable. As to the first, the covenant being an express covenant with the lessor, and not being a covenant running with the land, an action lies for the breach thereof, in the name of the personal representatives of the covenantee, who become trustees for the persons, whoever they may be, who are beneficially interested in the performance of the covenant.

As to the objections to the covenant itself, we do not think that any of the consequences above stated flow so naturally and necessarily from the observance of this covenant, as to call upon the Court to hold it to be void. It is not contended that the covenant is illegal on the ground of the breach of any direct rule of law, or the direct violation of any statute; and we think that, to hold it to be void on the ground of its impolicy or incon-

venience, we ought to be clearly satisfied that the performance of it would be necessarily attended with injury or inconvenience to the public. But such is not the case. There is nothing in the covenant which will prevent the poor generally from being employed by the defendant; he may employ as servants or apprentices the poor of that parish, who may be sufficient for the service of the mill; he may employ in those capacities the poor who have settlements in other parishes, but who have certificates from those parishes; or he may, in the case of servants, hire them for a less period than a year, and thereby prevent them altogether from gaining a settlement. There is consequently no general restraint of the poor from being employed in the service of the defendant in this particular parish; and as to any abstract right in a pauper to obtain a settlement in any parish he chuses to select, as he must have a settlement somewhere, the law will not consider a settlement in one parish rather than another as any benefit to the poor. If the objections urged in this case had been entitled to weight, we think they would not have been omitted in the case of *The Mayor of Congleton v. Pattison* (a); for although the question in that case was, whether the covenant ran with the land or not, this objection would at once put an end to the action. In *Hill v. Eastaff* (b), which was argued in the Court of King's Bench, in Easter Term, 1819, where an action of debt was brought upon a bond, conditioned that the obligors, who were the churchwardens and overseers of one parish, should indemnify the obligees, who were the churchwardens and overseers of another parish, and all the inhabitants of that parish, from all costs, charges and expenses, which might be incurred by the latter parish, by reason of one *Stevenson* having put himself apprentice to one


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(a) 10 East, 230.

(b) Not reported.

*Vide ante* 290, (a).

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*Moore*, in the latter parish: the Court gave judgment for the plaintiffs, and some of the objections above raised would have applied as well to that case as to the present. Upon the whole, therefore, we think that judgment should be given for the plaintiffs.

Judgment for the plaintiffs.

FORDE *v.* SKINNER. (a)

Cutting off the hair of a pauper in a poor house by force and against her will is an assault; and evidence that it was done maliciously, is admissible in an action, to increase the damages.

**TRESPASS** for an assault and false imprisonment, with a count for a common assault. Plea, the general issue.

The defendants were the parish officers of the parish of Ninfield, in Sussex; and the plaintiff was a young woman, who was a pauper in the poor house there. The false imprisonment was not proved; and the assault complained of was, that on the 10th of December, 1829, the defendants sent for the plaintiff into a room in the poor house, and by force, and against her consent, cut off her hair; and it appeared, that in the struggle occasioned by her resisting, one of her arms was bruised. It was shewn that the plaintiff wore long hair, and kept it in a clean and neat state: and there was also evidence given that when the plaintiff had shortly before gone with two of the defendants before the magistrates at Battle, one of the defendants said, alluding to the plaintiff and her sister, who was also in the poor house, that he would soon do something "to take their pride down." It also appeared, that the sister's hair was cut off in a similar way.

(a) This and the four following cases are taken, by permission, from Messrs. Carrington and Payne's Reports.



**BAYLEY, J.**, (in summing up).—However desirable such a regulation as that of cutting off the hair of persons in a poor house may be with regard to health and cleanliness, yet it is altogether unauthorised by law, and is a wrongful act, if done without the consent of the party. If, in this case, it was done violently and with force, and with the malicious intent imputed, namely, of “taking down their pride,” and not with a view to cleanliness, that will be an aggravation, and ought to increase the damages. You will therefore decide on the motives which actuated the defendants, and according to that decision you will estimate the amount of damages.

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Verdict for the plaintiff, damages 60*l*.

**PHILLIPS v. WIMBURN, Gent. &c.**

**TRESPASS** for an assault and false imprisonment. Plea, the general issue, and several special pleas of justification.

A witness for the plaintiff proved a dispute, and charge given to a constable, who took the plaintiff to a police office; and he stated that the defendant was sworn, and stated his case at the office against the plaintiff. The witness was commencing his account of what the defendant said, when

It is to be presumed that what is stated on oath before a magistrate is taken down in writing; and parol evidence of such a statement is not receivable, unless it be first shewn that it was not so taken down.

**Russell, Serjt.**, objected that the parol evidence was not receivable, as the presumption of law was, that what took place at a police office was taken down in writing.

**TINDAL, C. J.**, was of that opinion.

The witness being asked, said, that he did not see any thing taken down in writing.

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*Wilde*, Serjt., submitted, that, as a general rule, it would be inconvenient to hold that there was a general presumption of law, that statements were taken down in writing, when the witness said, that he did not see that any thing was so taken down.

TINDAL, C. J.—I think, that, when it appears that a witness was sworn, we must presume that what he said was taken down in writing. Sometimes a party goes into a police office and states a complaint, which goes off without his being sworn, and then it may not be taken down in writing. You may call the magistrate's clerk, and he will tell you whether there was any thing taken down in writing or not.

Verdict for the plaintiff.

The KING v. WILLIAM BIRKET.

Indictment for stealing a sheep. Proof that the animal stolen was a lamb. Held, a fatal variance, and the prisoner acquitted.

**INDICTMENT** for stealing a *sheep*, the property of *Henry Benwell*.

The prosecutor, in answer to questions put by the Learned Judge, said, that the stolen animal was under a year old, and that he should call it a *lamb*.

BOLLAND, B.—Upon this evidence I must direct an acquittal. In this indictment, the animal in question ought to have been called a lamb. Animals of this kind are lambs, and not sheep till they are a year old. There was a case lately before the twelve judges, in which a man had been indicted at the Old Bailey, and tried before *Parke*, J., for stealing a *sheep*, and it appearing at the trial that the animal was a *ewe*, the twelve judges held, that the prisoner could not be convicted, as

the statute used the words "ram, ewe, sheep," &c., and that if the animal was in fact a ewe, the indictment must so describe it; and it was not enough to use the general term sheep. If a ewe is stolen, it must be called a ewe in the indictment; and so a lamb must be called a lamb; but a wether should be described as a sheep (*a*).

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### Verdict, Not Guilty.

(*a*) By the stat. 7 & 8 Geo. 4, c. 20, s. 24, it is enacted, "that if any person shall steal any horse, mare, gelding, colt, or filly, or any bull, cow, ox, heifer, or calf, or any ram, ewe, sheep, or lamb, or shall wilfully kill any of such cattle, with intent to steal the car-

case, or skin, or any part of the cattle so killed, every such offender shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon." Vide *Res v. Loom*, R. & M. C. C. 160; *Res v. Puddifoot*, Id. 247.

### The KING v. READER and TURNER.

THE prisoners were tried before *Parke, J.*, at the Cambridge Summer Assizes, in 1829, upon an indictment, which in the first count, charged them with having "feloniously, *voluntarily*, and maliciously," set fire to and burnt a certain *barn*. The second count charged them with having "feloniously, *voluntarily*, and maliciously," set fire to and burnt a certain stack of *straw*, against the form of the statute. And there were two other counts exactly similar, for burning the barn, except that they laid the property in other persons; and concluded against the form of the statute.

It appeared that the prisoners had set fire to a barn, and also to a stack of what in Cambridgeshire is called *haulm*, and in some other counties stubble.

*Smith*, for the prisoners, objected, first, that this haulm set fire to was not straw within the meaning of the act of

An indictment for arson, under 7 & 8 G. 4, c. 30, charging the offence to have been committed "feloniously, *voluntarily*, and maliciously," instead of "feloniously, *unlawfully*, and maliciously," is bad.

So, if it describe the property burned as *straw*, and it is proved to be *haulm*.

An indictment, at common law, for burning a barn, must describe the barn as containing corn.

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Parliament, 7 & 8 Geo. 4, c. 30, s. 17. Secondly, that the first count was bad, as it did not state that the barn was full of corn, which was essential, as that count was framed at common law. Thirdly, that the three latter counts, which were framed under the statute 7 & 8 Geo. 4, c. 30, ss. 2 and 17, were bad, as they stated the offence to have been committed "*feloniously, voluntarily, and maliciously,*" instead of charging it to have been done "*feloniously, unlawfully, and maliciously,*" according to the words of the statute.

PARKE, J., reserved the points.

VAUGHAN, B., now delivered the opinion of the twelve Judges, who were unanimously of opinion that the indictment was bad upon all the objections taken at the trial.

The prisoners were again indicted under the statute 7 & 8 Geo. 4, c. 30, s. 2, for setting fire to the barn; and also under the same statute, s. 17, for setting fire to a "stack of straw called haulm." There were other counts for setting fire to a wheat stack, &c.

VAUGHAN, B., intimated, that in his opinion, it was unsafe to convict upon the count for setting fire to the straw called haulm; and the prisoners were convicted upon the other counts (a).

(a) Vide *Rex v. Turner and Reader*, R. & M. C. C. 239.

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## The KING v. HOLLINGSHEAD.

**INDICTMENT** for breaking and entering a dwelling house, and stealing therein bank notes and money.

Mr. *Cope*, the City Marshal, was called to depose to a statement made by Mr. *Gates*, the solicitor for the prosecution, to the Lord Mayor of London, at the Mansion house, on the examination of the prisoner.

*Storks*, Serjt., asked if the statement was taken down in writing.

*Andrews*, for the prosecution.—It need not be. Mr. *Gates* was not examined on oath, and what he said in the presence of the prisoner is admissible.

Mr. *Cope*, in answer to questions put by *Storks*, Serjt., stated, that Mr. *Hobler*, the clerk at the justice-room at the Mansion-house, was in the habit of taking down in writing whatever was stated on examination there; and that he believed that what Mr. *Gates* had said to the Lord Mayor on this occasion, was so taken down.

VAUGHAN, B.—I shall presume that what passed, being in fact part of the examination, was taken down in writing (a), and if so, the writing should have been here. I think I ought not to receive Mr. *Cope*'s evidence.

(a) *Vide* the case of *Phillips v. Wimburn*, ante, 295, in which *Tindal*, C. J., held, that it was to be presumed that what a party said upon oath before a magistrate, was taken down in writing, although the party called to give parol proof of it said, that he did not perceive that it was.

It is important to consider whether any thing said during the examination of a prisoner before a magistrate, can be received in evidence, merely on the ground of its being said in the presence of the prisoner. The reason why any thing said in the presence of the prisoner is receivable as evi-

A prisoner being under examination before a magistrate, on a charge of felony, a statement was made in his presence by the solicitor for the prosecution, which, the witness called to prove it said, he believed had been taken down in writing: Held, that parol evidence of the statement was not admissible on the trial of such prisoner.

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The evidence was rejected, and the case made out by other proof.

Verdict, Guilty.

dence against him is, that, being said in his hearing, he might have contradicted it if he had chosen. Now this seems hardly to apply to what takes place at the time of the examination before the magistrate, because, as the prisoner could not keep up a running commentary of contradictions, with respect to every thing said against him, the reason of admitting such evidence appears to fail. In the case of *Rex v. Appleby* and others, 3 Stark. N. P. C. 33, two prisoners were examined on a charge of horse stealing, and one of them, in the presence of the other, stated, that they jointly committed the felony; but this was held to be no evidence against the other, although he did not deny it. Indeed if what was said before the magistrate by persons not upon oath were admissible in evidence against the prisoner, as being something said in his presence, there would be this difficulty: viz., that what a witness said upon his oath before the magistrate, which was taken down in writing and signed by the witness, would not be admissible in evidence, unless such witness were dead; but, if a person, not upon his oath, chose to say any thing, what he said would be receivable, as being something

said in the presence of the prisoner: which as it seems, could hardly be the law. In the case of *Melan v. Andrews*, 1 M. & M. 336, it was held, that the deposition of a witness, taken in the presence of the party there charged, was not admissible in evidence in another proceeding against that party, on the ground that he was present, and might have cross-examined; and *Parke, J.*, said, "I think that the deposition of a witness taken in a judicial proceeding is not evidence, on the ground that the party against whom it is sought to be read was present, and had the opportunity of cross-examining. It clearly would not be admissible against a third person who merely happened to be present, and who, being a stranger to the matter under investigation, had not the right of interfering, and I think the same rule must apply here. It is true that the plaintiff might have cross-examined or commented on the testimony, but still, in an investigation of this nature, there is a regularity of proceeding adopted, which prevents the party from interfering when and how he pleases, as he would in a common conversation."

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## HARDY v. RYLE, Esq.

**FALSE imprisonment.** Plea, not guilty. At the trial before *Jervis, J.* at the Chester summer assizes (*a*), for 1828, the following facts appeared. The plaintiff was committed by the defendant, a magistrate for the county of Chester, to the house of correction, under the supposed authority of 4 *Geo. 4*, c. 34, s. 3(*b*), for one month,

A contract to weave certain goods at the house of the weaver is not a contract to serve within 4 *Geo. 4*, c. 34, s. 3, so as to give jurisdiction to a magistrate to commit the weaver "for neglecting his work after commencing upon the same."

(*a*) Counsel for the plaintiff, *J. Williams* and *Wightman*; for the defendant, *Cross, Serjt.*, and *J. Jervis*.

(*b*) Which enacts, "That if any servant in husbandry, or any artificer, calico-printer, handicraftsman, miner, collier, keelman, pitman, glassman, potter, labourer, or other person, shall contract with any person or persons whomsoever to serve him, her or them, for any time or times whatsoever, or in any other manner, and shall not enter into or commence his or her service according to his or her contract, (such contract being in writing, and signed by the contracting parties), or having entered into such service shall absent himself or herself from his or her service before the term of his or her contract, whether such contract shall be in writing or not in writing, shall be completed, or neglect to fulfil the same, or be guilty of any other misconduct or misdemeanor in the execution thereof, or otherwise respecting the same, then and in every such case it shall and may be lawful for any justice of the peace of the county

or place where such servant in husbandry, artificer, &c. or other person shall have so contracted or be employed or be found, and such justice is hereby authorised and empowered, upon complaint thereof made upon oath to him by the person or persons, or any of them with whom such servant in husbandry, artificer, &c. or other person shall have so contracted, or by his, her or their steward, manager or agent, which oath such justice is hereby empowered to administer, to issue his warrant for the apprehending every such servant in husbandry, &c. or other person, and to examine into the nature of the complaint, and if it shall appear to such justice that any such servant in husbandry, artificer, &c. or other person shall not have fulfilled such contract, or hath been guilty of any other misconduct or misdemeanor as aforesaid, it shall and may be lawful for such justice to commit every such person to the house of correction, there to remain and be held to hard labour for a reasonable time, not exceeding three months, and to abate a propor-

An action for false imprisonment against a magistrate may be commenced on the 14th of June, where the plaintiff is discharged out of custody on the 14th of December.

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under the following warrant: "Whereas information and complaint hath been made before me, *John Ryle*, Esq. one of his Majesty's Justices &c., by *Thomas Hall*, of &c., silk manufacturer, upon the oath of the said *T. Hall*, against *Henry Hardy*, of &c., silk weaver, that he the said *H. Hardy* did contract and agree with the said *T. Hall* to weave certain pieces of silk goods at certain prices fixed upon between the said *T. Hall* and *H. Hardy*, at his the said *H. Hardy*'s house in &c., and that he the said *H. Hardy* had neglected to fulfil the contract so entered into between them, although he had commenced upon the said work under the said contract."

The following is a copy of the warrant of commitment:

"And whereas, in pursuance of the statutes in that case made and provided, I have duly examined the proofs and allegations of both the said parties touching the matter of the said complaint, and upon due consideration had thereof, have adjudged and determined that the said *H. Hardy* hath in his said service been guilty of certain misconduct and ill-behaviour towards the said *T. Hall*, in that he the said *H. Hardy*, having contracted with the said *T. Hall* to weave certain pieces of silk goods at certain prices fixed upon between the said *T. Hall* and *H. Hardy*, at his the said *H. Hardy*'s house, in &c., hath neglected to fulfil the contract so entered into between them, although he hath commenced upon the said work under such contract, and hath neglected his work without the leave or consent of the said *T. Hall*, and I do therefore convict him the said *H. Hardy* of

tionable part of his or her wages for and during such period as he or she shall be so confined in the house of correction, or in lieu thereof to punish the offender by abating the whole or any part of his or her wages, or to discharge

such servant in husbandry, artificer &c., or other person from his or her contract, service or employment, which discharge shall be given under the hand and seal of such justice gratis."



the said offence in pursuance of the statute in that case made and provided." The warrant then went on to command the constable to convey the plaintiff to the house of correction at Knutsford, and the keeper to receive him, there to remain for the space of one month from the date of the warrant.

The plaintiff was discharged out of custody on the 14th December, 1827, at nine o'clock in the morning (a), and the writ issued on the 14th of June, 1828. The defendant put in the conviction recited in the warrant of commitment. Upon these facts it was contended, that the plaintiff ought to be nonsuited, first, because the action was not commenced within six calendar months after the act done, as required by 24 Geo. 2, c. 44, s. 8; and secondly, that the conviction and commitment were warranted by 4 Geo. 4, c. 34, s. 3. The jury assessed the plaintiff's damages, in case he was entitled to recover, at one farthing; and the learned Judge nonsuited the plaintiff, with leave to move to enter a verdict for the damages found by the jury. A rule nisi to that effect having been obtained,

*Cross*, Serjt., and *J. Jervis*, now shewed cause. The 24 Geo. 2, c. 44, provides, (s. 8,) "that no action shall be brought against any justice of the peace for anything done in the execution of his office, unless commenced within six calendar months after the act committed." Under this statute the time within which the action is to be brought must be reckoned exclusively of the day on which the imprisonment took place. *Rex v. Adderley* (b), where all the cases are collected; *Pellev v. The Hundred of Wonford* (c), *Norris v. Hundred of Gawtry* (d), *Castle*

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(a) *Vide post*, 307, n.

(c) *Ante*, 127.

(b) *Dougl.* 463.

(d) *Hob.* 195.

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*v. Burditt (a), Clarke v. Davey (b), Com. Dig. Temps, A., Pugh v. Duke of Leeds (c), Thomas v. Popham (d),* recognized and adopted in *Watson v. Pears (e), Fallon, ex parte (f), Lester v. Garland (g),* where the question was, whether the plaintiff was privy to the act; *Glassington v. Rawlings (h),* adopted by the Master of the Rolls in *Lester v. Garland, Wallace v. King (i),* and *Basten v. Carew (k);* and though the contrary was decided in *Lester v. Garland,* and *Pellew v. The Hundred of Wottonford,* those were cases in which, according to the distinction taken by Sir *W. Grant, M.R.,* the party was not privy to the act; whereas here the plaintiff must be privy to the imprisonment; no mischief could arise. [*Bayley, J.* According to the construction contended for, the plaintiff would have six months in a case of imprisonment, and one day more upon seizure of goods.]

The Court directed that the second point should not be spoken to unless their decision upon the first point should render it necessary.

*J. Williams* and *Wightman,* in support of the rule upon the first point. The common sense and invincible reasoning of the Master of the Rolls are decisive upon this point, *Pickersgill v. Palmer (l).* The preamble to the annuity act is equally strong.

*Cur. adv. vult.*

The judgment of the Court upon the first point was delivered on a subsequent day (*m*) by

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|----------------------------------------|------------------------------|
| (a) 3 T. R. 623, <i>post</i> , 307, n. | (h) 3 East, 407, and 4 Esp.  |
| (b) 4 J. B. Moore, 465.                | 224.                         |
| (c) Cowp. 714.                         | (i) 1 H. Black. 13.          |
| (d) Dyer, 218, b.; F. Moore,           | (k) 5 D. & R. 558, 3 B. & C. |
| 40.                                    | 649.                         |
| (e) 2 Campb. 294.                      | (l) Bull. N. P. 24.          |
| (f) 3 T. R. 283.                       | (m) 25 April.                |
| (g) 15 Vesey, 248.                     |                              |

BAYLEY, J. who, after stating the facts, and referring to the language of 24 Geo. 2, c. 44, s. 8 (a), proceeded thus: The same construction must prevail, whether the act complained of be an imprisonment or a seizure of goods. All the authorities were considered by Sir *William Grant*, M. R. in *Lester v. Garland*, upon which this distinction was taken, that where the act is one to which the party against whom the computation is made is privy, the day on which the act is done may be included. Where that party is a stranger to the act, the day ought to be excluded, and many instances are put. Here every continuance of the imprisonment is, in point of law, a new imprisonment. The same construction must be put upon 24 Geo. 2, c. 44, s. 8, whether the act complained of be imprisonment or seizure of goods. In the case of seizure of goods of the plaintiff's, that being an act to which he is not privy, the day of the seizure would be excluded from the computation. In *Pellew v. The Inhabitants of the Hundred of Wonford* (b), this Court acted upon the rule laid down by Sir *William Grant*, M. R. holding that the day of the happening of the event was to be excluded from the computation. So where the party who is to give the notice is the party robbed, he must be taken to know when he was robbed. Upon this principle, my brother *Littledale* and myself are of opinion, that the 14th December ought to be excluded, and that the action was commenced in time. My brother *Parke*, having been counsel in the cause, has taken no part in this discussion.

*J. Jervis* now shewed cause upon the second point. The words "handicraftsman or other person" will include silk weavers. The warrant of commitment sets out a complaint that the plaintiff had contracted to do certain work, that he had commenced the work under

(a) *Ante*, 303.(b) *Ante*, 127.

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the contract, and that he had neglected to fulfil such contract, and the magistrate adjudges that he has been guilty of misconduct in *his said service* towards his master, in that he having contracted &c., hath neglected to fulfil the contract, although he hath commenced upon the said work under such contract, and hath neglected his work without the leave or consent of his master. A commitment is not to be construed with the same strictness as a conviction. *The King v. Helps (a)*.

*J. Williams and Wightman*, contra. Silk weavers are regulated by 17 *Geo. 4*, c. 56; and it cannot be supposed that the legislature meant to give jurisdiction over them by a subsequent statute, in which they are not named. But however this may be, it is clear that 4 *Geo. 4*, c. 34, s. 3, applies only to contracts of *service*. Here no such contract appears. A servant may be guilty of larceny in respect of goods with which he is entrusted; here the plaintiff could not have committed a larceny in respect of the silk delivered to him.

BAYLEY, J.—It becomes unnecessary to decide whether the silk trade is within the provisions of 4 *Geo. 4*, c. 34, s. 8. To bring a case within that act, the party must have contracted to *serve*. There is a plain distinction between becoming the servant of another, and contracting to do specific work for him. A person who has contracted to do work for many persons cannot with propriety be said to have contracted to *serve* each of them. The conviction and commitment are bad in not shewing that the plaintiff contracted to serve.

LITLEDALE, J.—I am of the same opinion. The 4 *Geo. 4*, c. 34, s. 3, requires either actual service, or a contract for service. Here neither is to be found. The

(a) 3 M. & S. 331.

defendant, therefore, does not shew that he had jurisdiction.

PARKE, J. gave no opinion.

Rule absolute (a).

(a) In an action against magistrates, the notice was served on the 15 May, the latitat issued 15 June. In supporting a rule for setting aside a nonsuit before *Graham*, B. which had been obtained by *Pell*, Serjt., on other grounds, *Mannings* submitted that as the 24 Geo. 2, c. 44, requires the delivery of a notice in writing at least one calendar month before the suing out and serving of any process, the interval was not sufficient, and referred to *Zouch v. Empey*, 4 B. & A. 522, as shewing decisively that the words "at least" made both days exclusive, although in that case it was urged, that in favorem libertatis such a construction ought not to be adopted. *Manning* was asked by the Lord Chief Justice if he was aware of the case of *Castle v. Burditt*, 3 T.R. 623. This he distinguished from that now before the Court, on the ground that the words "at least" did not occur in the Excise Act, 23 Geo. 3, c. 70; upon the construction of which the case of *Castle v. Burditt* had been decided.

*Adam* and *Bayly*, for the plaintiff, insisted, that the words "at least" made no difference; and they observed that it did not appear upon the evidence in the cause but that the service of the notice might have taken place at an earlier hour in the day than that at which the process issued.

The Court said, that the point was of importance to all the magistrates in the kingdom, and ought not to be disposed of in this summary way, where the parties had no opportunity of having the judgment of the Court revised upon a writ of error, and directed that the cause should go down again to trial in order that the facts, including the time of the day when the notice was served, and when the writ issued, might be put upon the record. *Gould v. Hole* and *Whyte*, K. B., H. T. 1822, MSS.

At the Exeter summer assizes, 1822, the plaintiff abandoned his suit, and a verdict was recorded for the defendants. And see *Higgins v. M'Adam*, 3 Younge & Jervis, 1, and 16, (b).

A notice of action against a magistrate will support an action against the magistrate and constable jointly, *Jones v. Simpson*, 1 Crompton and Jervis, 174. So, though the plaintiff first sue out process against the magistrate alone, which he abandons. *Ibid*. So, where notice of action is served on each defendant, under 24 Geo. 2, c. 44, (*Bar v. Jones*, 5 Price, 168,) or in respect of proceedings under the Regent's Canal Act, (*Agar v. Morgan*, 2 Price, 126,) it is not necessary to state whether the action is intended to be joint or several, or to make any mention of the party or parties intended to be joined.

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Notice of action against Justices served 15 May; latitat issued 15 June. Qu. whether issued too so

C A S E S

IN THE

*COURT OF KING'S BENCH,*

FOR THE USE OF

**Justices of the Peace.**

EASTER TERM, 1829.

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Ex parte SUSANNAH SCOTT.

A British subject, arrested abroad, under a warrant upon an indictment for a *misde-meanour*, brought in custody to England, and there committed to prison, is not entitled to be discharged. Per Lord *Tenterden*, C. J., and *Parke*, J., dubitante *Lit-tledale*, J.

**CHITTY** had obtained a rule nisi for a habeas corpus to bring up the body of *Susannah Scott*, a prisoner in the custody of the Marshal, for the purpose of her being discharged out of custody. The affidavits stated that a true bill had been found against the prisoner upon an indictment for perjury, and that Lord *Tenterden*, C. J., had granted a warrant for her apprehension, to compel her to appear and plead to the indictment; that one *Ruthven*, a police officer, to whom the warrant was specially directed, apprehended the prisoner at Brussels; that the prisoner applied to the British ambassador there, who declined interfering; and that *Ruthven* conveyed her from thence to Ostend, and so to England, and finally before Lord *Tenterden*, who committed her to the King's Bench prison, for want of bail.

*Brougham* and *Platt* shewed cause. There is no ground for discharging this prisoner. A true bill has been found against her for a misdemeanour, and as she either could not or would not find bail when she was committed, there can be no doubt that she is now lawfully in custody. The only ground on which this rule could have been obtained, must be that the prisoner was unlawfully arrested in the first instance; but as she is now clearly liable to be detained upon a criminal charge, the Court will not inquire into the means by which she was originally apprehended. *Rex v. Marks*(a), *Ex parte Krans*(b). If a writ of habeas corpus had been granted in the first instance, the facts already adverted to would have formed a good return, for on a return to that writ it is sufficient for the gaoler to shew the warrant for the detention of the prisoner, he is not bound to set out the caption. The practice in civil and criminal cases has always proceeded upon this distinction. In civil cases the Court will inquire into the means by which the arrest was effected, and will discharge the prisoner if improper means appear to have been resorted to; *Lyford v. Tyrrel* (c), *Spence v. Stuart* (d): in criminal cases the Court will do neither, because public justice requires that the party, being in custody upon a criminal charge, should be detained, whatever means may have been used to place him there(e).

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*Chitty*, in support of the rule. It is admitted, and

(a) 3 East, 157.

(b) 2 D. & R. 411; 1 B. & C. 258.

(c) 1 Anstr. 85.

(d) 3 East, 89.

(e) In *Rex v. Horner*, Cald. 295, it is said, "The Court of King's Bench, upon an applica-

tion to bail, require to see the depositions, and will from thence, if they see just cause, discharge, bail, or remand the prisoner, without regarding the regularity or irregularity of the commitment." That, however, was a case of felony.

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could not indeed be denied, that in arrests upon civil process the rule laid down in the two cases last cited has always been adhered to. It is true that in the case of *Rex v. Marks* (a) and *Ex parte Krans* (b) this Court did refuse to discharge the parties on account of defective commitments, but the answer to the argument thereon founded is, that in both those cases the prisoners were charged with felony. In the present case the prisoner, a female, is charged with a misdemeanour only, and in favour of the liberty of the subject the Court will think it right to abstain from extending to cases of misdemeanour a rule which, hitherto, certainly, has been confined to cases of felony. The arrest in this case was illegal in every point of view, being contrary at once to the law of this country, to the law of Belgium, where it was effected, and to the law of nations. In *Rex v. Marks* (a), the reason for the Court's refusing to bail, and remanding the prisoner, was, that although the warrant of commitment was informal, the corpus delicti appeared in the depositions (c); therefore, independently of the distinction between cases of felony and of misdemeanour, that case is inapplicable to the present. In *The Attorney-General v. Carl Cass* (d), the Court of Exchequer discharged a prisoner detained in custody under legal process, issued while he was in gaol under an arrest which was originally illegal.

Lord TENTERDEN, C. J.—The case last referred to was an information for penalties under the revenue laws, a proceeding which, though criminal in its form, is in its nature more like a civil action to recover a debt (e), than

(a) 3 East, 157.

(b) 2 D. & R. 411; 1 B. & C. 258.

(c) Vide *Rex v. Horner*, ante, 309, (e).

(d) 11 Price, 345.

(e) As to the king's action of debt in the form of an information in personam, vide *Attorney-General v. Aldersey*, 1 East, 341; Mann. Exch. Pract. 2d ed. 193 (g), 201.



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a criminal prosecution to inflict punishment upon an offence against the public. With this observation I may dismiss that case. As regards the case now before us, I think the question should be considered precisely in the same way as if the prisoner were now brought into Court under the warrant granted for her apprehension; for certainly she ought not to sustain any prejudice now from the circumstance of her having been committed by me on a former occasion. Now the question is shortly this:—whether, if a party charged with a crime is found in this country, it is the duty of this Court to take care that he shall be rendered amenable to justice; or whether the Court is bound to inquire into the circumstances attending his apprehension, and under which he was brought into this country. I thought on the former occasion that I could not properly enter into such an inquiry, and I am of the same opinion still. If the arrest was made in violation of the law of Belgium, the authorities of that country might have interfered to vindicate their own law. If it was made in violation of our law, the prisoner has a right of action, and may pursue her legal remedy. I am free to confess that I am not aware of any instance in which the government of a foreign country have interposed to assist in the apprehension and the bringing hither a person charged with a misdemeanour only. In cases of felony, however, I know that it has been done more than once, for I have myself granted the warrant for the apprehension of the party accused; and, for this purpose, I do not know how to distinguish between one class of crimes and another: the same principle appears to me to apply equally to both. I am, therefore, of opinion that this rule ought to be discharged.

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LITLEDALE, J. (a).—I entertain great doubts upon this question, which appears to me one of very considerable importance. That persons accused of felony have been apprehended under circumstances similar to those in the present case, I am aware, and I think properly so; but it is another thing to say that such a practice shall extend to every case of misdemeanour, however trifling,—for where can the line be drawn?—and that a party charged with a common assault in London shall be arrested at Paris or St. Petersburg, and brought back hither in custody. I repeat that I very much doubt whether, upon any sound principle of general justice or of national law, the authorities of Belgium ought to have allowed an English subject, charged with a misdemeanour here, to be apprehended in their dominions. Upon the whole, and as at present advised, I incline to think that they ought not, and that the prisoner, having been apprehended under such circumstances, ought to be discharged.

PARKE, J.—Upon the best consideration that I have been able to give this question, which is certainly of importance as regards the liberty of the subject, I concur with my Lord Chief Justice in the view he has taken of it. When a party is solemnly charged upon the oaths of a grand jury with the commission of any offence against the public, whether a felony or a misdemeanour, and is found in custody in this country, I think that public justice requires, and that it is the duty of this Court to provide, that if he cannot find bail he shall be detained in custody to answer that charge: and that, without inquiring into the circumstances under which he was taken into custody. If such a party has been really illegally arrested, he has his remedy for that wrong by

(a) *Bayley, J.*, was gone to chambers.

action; but he is not to be allowed the opportunity of escaping and altogether eluding public justice, merely because there was some irregularity in his original apprehension.

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Rule discharged.

The KING, on the prosecution of ELIZABETH WELLS,  
 Spinster, v. WHATELY, clerk.

IN Hilary Term last, *Merewether*, Serjt., obtained a rule calling upon the defendant to shew cause why an information should not be exhibited against him for certain misdemeanors. This rule was granted upon affidavits stating, that the prosecutrix, now 74 years of age, had for 20 years and upwards been in the possession of a cottage and garden in the parish of Cookham, in the county of Berks, adjoining the vicarage house and glebe; that the defendant was vicar of Cookham, and a justice of the peace for Berkshire; that disputes had arisen between the prosecutrix and the defendant, respecting a small portion of land lying between their respective properties, which was described in the prosecutrix's title deeds from 1661 as part of her estate, was inclosed within her fences, and had always been enjoyed by her until 1823; that the defendant having claimed this portion of land as belonging to the vicarage, the prosecutrix proposed that such claim should be submitted to arbitration, and offered her title deeds for the defendant's inspection, both which were refused; that the defendant called on the prosecutrix in December, 1822, and told her, that, unless she would give up this piece of land, he

given to him, the magistrate, on oath; whereas no oath had been taken, and the information had been communicated by the magistrate to the informer, the Court, in discharging a rule for a criminal information against the magistrate, refused to give him his costs.

Where shrubs are cut, upon an unproved allegation that they were likely to be injurious to an adjoining wall, the case is within the malicious trespass act, though the title to the spot on which the shrubs grew be in dispute between the parties.

Where a magistrate, upon whose property a malicious trespass had been committed, issued a summons requiring the offender to appear before himself, or some other magistrate, and purporting that information had been

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would pull down the wall which separated it from the vicarage; that on the 4th March, 1823, the prosecutrix was served with a notice requiring her to give up to the defendant, at Michaelmas then next, possession of all the lands and premises she held at C., in the county of B., belonging to the vicar of C.; that the prosecutrix having disregarded this notice, the defendant, in the latter part of 1823, threw down the wall, and separated the portion in question from the residue of the prosecutrix's land by sticks and stakes, forming no fence; that on the 18th November, 1828, the prosecutrix observing that the branches of an elder bush, which the defendant had planted on the portion of land in question, within six inches of a brick wall of the prosecutrix, were growing in such a manner as appeared to her to injure the wall, she cut off such branches with a pocket knife which she happened to have about her; that the prosecutrix acted solely from an apprehension that the branches would injure the wall, which had fallen down twice within a short period; that on the 19th November, *Ward*, an attorney, called on the prosecutrix with the following note from the defendant:

“ Madam,—I send you herewith the Malicious Trespass Act (*a*), requesting Mr. *Ward* to explain any part

(*a*) 7 & 8 *Geo.* 4, c. 30, which provides, sect. 20, “ That if any person shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the injury done being to the amount of one shilling at least, every offender being convicted before a justice of the peace,

shall for the first offence forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding 5*l.* as to the justice shall seem meet; and if any person so convicted, shall afterwards be guilty of any of the said offences, and shall be convicted thereof in like manner, every such offender shall for such second offence be committed to the common gaol or house of correction, there to be kept to

of it to you with which you may be unacquainted. The course which I shall prescribe to myself will be to refer the present case to the bench at Maidenhead, and to require your attendance, together with the witnesses, there on Monday next at 12 o'clock, unless you wish me to determine the case immediately, which, you may observe, *I have the power to do*, in order to spare you the exposure of a public examination. I shall much prefer the common course mentioned above, viz. referring the matter to the bench at Maidenhead, but leave you to determine which should be adopted.

I am, madam, your's, &c. *Thomas Whately.*"

That *Ward* stated and explained to the prosecutrix

hard labour for such term not exceeding 12 calendar months, as the convicting justice shall think fit, and if such second conviction shall take place before two justices, they may further order the offender, if a male, to be once or twice publicly or privately whipped after the expiration of four days from the time of such conviction; and if any person so twice convicted shall afterwards commit any of the said offences, such offender shall be deemed guilty of felony, and being convicted thereof, shall be liable to any of the punishments which the court may award for the felony hereinbefore last mentioned."

By sec. 30, "For the more effectual prosecution of all offences punishable on summary conviction under this act," it is enacted, "that where any person shall be charged *on oath* of a credible witness, before any justice of the

peace, with any such offence, the justice may summon the person charged to appear at a time and place to be named in such summons; and if he shall not appear accordingly then (upon proof of the due service of the summons upon such person, by delivering the same to him personally or by leaving the same at his usual place of abode) the justice may either proceed to hear and determine the case *ex parte*, or issue his warrant for apprehending such person and bringing him *before himself*, or some other justice of the peace; or the justice before whom the charge shall be made, may, (if he shall think fit) without any previous summons (unless where otherwise specially directed), issue such warrant; and the justice before whom the person charged shall appear, or be brought, shall proceed to hear and determine the case."

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the great power vested in the magistrates by the act, which he read over to her, and advised the prosecutrix to compromise the matter, informing her, that if she desired to compromise, and would apologise for the offence which she had committed, the defendant was ready to accept the penalty, instead of summoning her to the justice meeting; that the prosecutrix rejected this proposal; that on the 21st November, 1828, the following summons was served on the prosecutrix:—

“Berkshire to wit: To the petty constable of the parish of Cookham, in the same county. Whereas *John Clark*, gardener to the Reverend *Thomas Whately*, of &c. clerk, hath this day *made information* and complaint *upon oath* before me, one of his majesty's justices of the peace in and for the said county, that *Elizabeth Wells*, of the parish of Cookham aforesaid, spinster, did unlawfully and maliciously cut and damage several trees and shrubs growing in a shrubbery in the parish of Cookham aforesaid, the property of the Reverend *Thomas Whately*, contrary to the form of the statute in that case made and provided: These are, therefore, to command you, in his said majesty's name, to summon the said *Elizabeth Wells* personally to appear *before me*, or such other of his majesty's justices of the peace for the said county as shall be present, at the Swan Inn, at Maidenhead, in the said county, on Monday, the 24th day of November instant, at the hour of 11 in the forenoon of the same day, to answer unto the said complaint, and further to do and receive what to the law doth appertain. And be you then there to certify what you shall have done in execution thereof. Herein fail you not. Given under my hand and seal, the 19th day of November, in the year of our Lord 1828. *Thomas Whately*.” (L. s.)

That on 24th of November, when the prosecutrix's horses were at her door for the purpose of taking her to

the justice meeting, *Lee*, the attorney for the parish of Cookham, advised the prosecutrix to submit, and to accept the terms offered by the defendant, viz. to pay the 5*l.* penalty, and make a substantial fence to inclose the said portion of land; that the prosecutrix not being aware of any connexion between *Lee* and the parish of Cookham, suffered herself to be persuaded by him to pay the 5*l.* to the defendant; that on January 16, 1829, *Lee* addressed the following letter to the prosecutrix's attorney:—

“ Maidenhead, 16th January, 1829.

Sir,—My letter to Mrs. *Wells*, of 23d November last, will inform you of the reasons which induced me to advise her to avoid the public investigation of Mr. *Whately's* charge against her. Having obtained her consent to endeavour to effect an arrangement or compromise of the matter, I waited on Mr. *Whately* with that view. He represented to me that a great number of shrubs had been cut by some person, along the whole line of the border, extending from Mrs. *Wells's* fence towards Mr. *Whately's* house. Although there was no proof that any other shrubs than the elder had been cut by Mrs. *Wells*, it appeared to me likely that the magistrates would be apt to presume, on proving Mrs. *Wells's* admission respecting the elder tree, that she had cut the other shrubs also; especially as it seemed quite impossible that the elder tree could have been cut, unless by some person actually standing on Mr. *Whately's* ground. Mr. *Whately* also stated, that he was in possession of some letters written by Mrs. *Wells* (if I recollect right, to Lady *Orkney*.) which he intended to produce to the magistrates, in order to shew that Mrs. *Wells* had long indulged an implacable spirit towards him. Under these circumstances, and knowing the difficulty I should have in confining Mr. *Whately* to what would be strictly admissible evidence, before the bench, I was very desirous

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to prevent the necessity of Mrs. *Wells's* appearance in public. The only terms I could make with Mr. *Whately* were, that Mrs. *Wells* should pay 5*l.* to Mr. *Whately*, to be laid out in coals for the poor in the village, and that she should put up a fence of wooden paling at that end of the piece of Mr. *Whately's* ground, at which he supposed she entered. Mrs. *Wells* acceded to these terms, and paid the money. As no conviction took place, I should conceive it was in the nature of a compromise. This is all the information I can give you upon the subject.

I remain, &c.,

*John D. Lee."*

That *Clark*, the informant, stated that he did not see that the prosecutrix cut the trees or pulled them out, and could not say of his own knowledge that she did it, and that he never made any oath or gave information to the defendant, but on the contrary, received his information as to the circumstances from the defendant.

Cause was now shewn upon affidavits stating, that in 1797, a dispute having arisen between the defendant and *Hexter*, the then occupier of the prosecutrix's cottage, respecting another portion of land which the defendant wished to throw into the vicarage, the prosecutrix informed the defendant that he might compel *Hexter* to give up that portion of land, by threatening to take from him the parcel of land now in dispute; and referred the defendant to an entry in the parish books, evidencing the right of the vicar to the parcel of land in question, and shewing that it was held under the vicar at 2*s.* 6*d.* rent; that after the prosecutrix became possessed of the cottage, she paid the defendant the rent of 2*s.* 6*d.* per annum for the parcel of land in question; that disputes having afterwards arisen between the defendant and the prosecutrix, as to the right to this parcel of land, the prosecutrix agreed to abandon her claim, and to sign an ac-



knowledge of the defendant's title as vicar, upon her being permitted to continue the occupation at the 2s. 6d. per annum; that the following instrument was then drawn up, and was signed by the prosecutrix.

"Extract from the old Register Book belonging to the parish of Cookham, Berks:—A memorandum made March the 20th, 1732, that Mrs. *Grace Goldsborough* rents of the Rev. *Thomas Aleyn*, vicar of Cookham, in the county of Berks, at the yearly rent of 2s. 6d., a piece of garden ground at the north end of the said Mrs. *Goldsborough's* garden, for the term of three years from Michaelmas last, containing, &c.; which piece of ground belongeth to the vicar of Cookham for the time being. To the above agreement I accede, *E. G. Wells*. 3d September, 1813."

That the prosecutrix continued tenant to the defendant, paying said annual rent until 1823, when the defendant, in consequence of certain malicious reports spread by the prosecutrix, and tending to injure the character of the defendant, purporting that the defendant had improperly wrested from her the said parcel of land, became dissatisfied with the prosecutrix, gave her notice to quit, and upon the expiration of that notice took possession; that the elder bush cut down on the 17th of November was of a rare and valuable species, *Sambucus racemosus*; that the defendant sent Mr. *Ward* to the prosecutrix with the Malicious Trespass Act, in order to put her fully on her guard, and afford her an opportunity of getting legal advice; that the defendant did not authorise *Ward* to advise the prosecutrix to compromise; that the defendant, being informed that *Lee* had been retained by the prosecutrix as her attorney with reference to the summons, and that it was his intention to request permission (a) of the

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(a) It has never been determined, that upon the bearing of cases, and probably never will be, which are subjected to the final

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magistrates to attend with her before them, wrote to *Lee* as follows:—

“ Sunday morning, 23d.

Dear Sir,—I hasten to thank you for your note, and to assure you, as I did your uncle before you, that I am glad *Miss Wells* is in such good hands. Would that she possessed a little of your temper, and was guided by your spirit. As it is she is rushing wantonly upon a dreadful exposure. I have exercised, (as I shall shew,) an uniform forbearance, and would now, if she would

decision of justices of the peace, they have any authority to exclude the public.

In *Cox v. Coleridge*, 2 D. & R. 86, and 1 B. & C. 37, it was held, that an attorney retained by a prisoner charged with felony, to give him advice and assistance during his examination before magistrates, might be lawfully excluded, on the ground that it was *merely a preliminary inquiry*. The attention of the Court, however, in that case, does not appear to have been drawn to the statutes 1 & 2 Ph. & M. c. 13, and 2 & 3 Ph. & M. c. 10, the former of which provides, “ that justices before whom such prisoner is brought for any manslaughter or *felony*, before any bailment or mainprize, (or by 2 & 3 Ph. & M. c. 10, where the prisoner is committed,) shall take the examination of the said prisoner, and informations of them that bring him, of the fact and circumstances thereof; and the same, or as much thereof as shall be material to prove the felony,

shall be put in writing, before they make the same bailment: which said examination, together with the said bailment, the justices shall certify at the next general gaol delivery to be holden within the limits of their commission.” Under these statutes it has been held, that if the examinant die before the trial of the felony, his examination may be received in evidence against the prisoner, on the ground that the prisoner has had the opportunity of cross-examining the examinant. Under the decision in *Cox v. Coleridge*, it would seem that a prisoner may be deprived of the means of cross-examining his accusers before the magistrate, on the ground that the investigation is merely in the nature of a precognition; and that when taking his trial for his life, he may be told, upon the production of the examination of a deceased witness, that his time for detecting the falsehood of the charge by cross-examination is gone by.

allow me, spare her the disgrace to which she is hastening: but there is a point beyond which forbearance is a weakness. I must protect myself against malicious trespass; this protection is all I seek; and if this can be obtained in any milder way than bringing her before the magistrates, I shall be satisfied; for I have not the slightest feeling of ill-will towards her.

I am, sir, your obedient servant, *Thomas Whately.*  
To *John D. Lee*, Esq. Attorney at law."

That on the morning of the 24th, when the defendant was about to set out for the justice meeting at Maidenhead, *Lee* called on the part of the prosecutrix, and expressed her regret for what had passed, and her readiness to make compensation for the damage; that *Lee* then proposed that the prosecutrix should pay 5*l.* for the use of the poor, and should restore the fence; to which proposal the defendant acceded; that *Clark*, when taken by the defendant to the spot where the elder bush had stood, observed and gave information to the defendant of other shrubs which had been cut; that *Clark* was informed by the defendant that he was not on oath; that the summons was filled up from a printed form, and the words "on oath" were intended to be erased.

Sir *J. Scarlett* and *Rogers* now shewed cause. After the distinct recognition by the prosecutrix of the defendant's title, it is clear that the right set up by the prosecutrix was a mere after-thought. It would have been useless to have resorted to arbitration, since the successor would not have been bound by any award.

*Mereweather*, Serjt., and *Manning*, contra. The prosecutrix acted bonâ fide in the assertion of her claim to this property, and in the removal of what she considered to be injurious to the wall. The defendant states his

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belief that other shrubs were destroyed by the prosecutrix, but no facts are alleged to support his suspicions. As the prosecutrix had no opportunity of contradicting such surmises, so neither could she have anticipated them. Here the defendant had no jurisdiction, first, because the trespass was committed in the assertion of a right; secondly, because the statute requires an information *on oath*; and, thirdly, because he himself was a party, and could not be a judge in his own cause. The payment of the 5*l.*, which has been wrongfully obtained from the prosecutrix, will no doubt be used against her upon the trial of her title to the plot in question; whereas it would have been competent to her to remove any prejudice which might be thrown upon her title by the former arrangement between the parties, by shewing, as the fact is stated to be, that they referred to a different spot.

Lord TENTERDEN, C. J.—I am clearly of opinion that this rule ought to be discharged. The prosecutrix considered herself aggrieved by this land's having been taken from her. It appears that Mr. *Whately* had planted shrubs of a particular kind. It is conceded that the prosecutrix cut two of these shrubs; and there is every reason to suppose that she cut a great many more. I entertain no doubt that this was an act of malicious trespass, within the meaning of the act. The pretences set up by the prosecutrix are merely futile.

If nothing more had appeared, we ought to have made the prosecutrix pay the expenses which Mr. *Whately* has incurred in opposing this rule; but something appears which we cannot altogether approve of. Mr. *Whately* should have left it to other persons to have issued a summons. In that summons it is also inadvertently alleged that the information had been given on oath.

In both these particulars *Mr. Whately* acted unadvisedly; and though we much disapprove of the conduct of the prosecutrix in destroying these shrubs, we think that we cannot give *Mr. Whately* his costs.

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Rule discharged, without costs.

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The KING v. The Commissioners of Sewers for the  
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**THIS** was a rule calling upon the commissioners of sewers for the limits of the Tower Hamlets, to shew cause why a writ of certiorari should not issue, directed to them, to remove into this Court a certain presentment made by a jury at a Court of Sewers holden within the said limits, and delivered to the said Court of Sewers, concerning sewers and other works within the several limits of the said district; and also a certain order for a rate made by the said commissioners at two shillings in the pound over the whole of the said Tower Hamlets, founded on the said presentment. The affidavits disclosed the following facts:—

Where a district, within one commission of sewers, is divided into separate levels, each drained by a separate line of sewers, and deriving no benefit from the sewers in the others, each level must be separately rated.

The commissioners of sewers for the Tower Hamlets have always acted under one commission for the whole district, and their commission has always been in the form set out in the statute of sewers, 23 *Henry* 8. From the earliest period at which commissions of sewers have been granted for that district, down to 1821, the commissioners treated it as containing six different levels or lines of large leading sewers; and in all presentments of juries made touching the sewers within the said limits, and in all rates imposed by the commissioners pursuant to such presentments, the juries and the commissioners

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always acted upon the acknowledged principle that there were six different levels or lines of large leading sewers in the said limits; and always, in such presentments and rates, divided the said limits into six different levels or districts, making each district liable to the repair of those sewers only from which it derived benefit. Down to 1821, separate presentments, by different juries, at distinct periods, and separate rates, were always made for each of the six different levels or lines of large leading sewers, not contemporaneously, but as circumstances required, and the rates were different and separate in amount, and the rates and presentments were made at different times, as the state of repair of the sewers in each level required them. The names of the owners or occupiers of premises in each level, who were benefited by the sewers in that level, were always set out in a schedule annexed to each presentment. Down to 1815, the accounts of the different levels were kept separate and distinct, but since that time they have all, by order of the commissioners, been kept in one general account. Ever since 1821 the commissioners have been endeavouring to establish one general and equal rate over the whole limits. In 1825 they empannelled a jury to make one general presentment of all the sewers within the whole limits, and made an equal rate for the whole limits. That rate was quashed for informality. In 1828 another general presentment was made, and another equal rate was made, over the whole limits. This was resisted by the inhabitants of the parish of Hackney, one of the six levels, who had always before been presented and rated separately for the repairs of the sewers within their own level, which were maintained at a much smaller expense than the sewers in the other five levels, from which they derived no benefit, the chief part of the drainage in the parish of Hackney being by means of a

natural brook, and some small branch sewers communicating with it, and which were entirely distinct from, and unconnected with, the sewers of the other five levels.

The case was argued on a former day in this term by

Sir *J. Scarlett*, *Gurney*, *Curwood*, and *Chitty*, in support of the presentment and rate, and by

*Tindal*, *S. G.*, *Campbell*, and *Brodrick*, in support of the rule for quashing the same; but it is deemed unnecessary to insert their arguments here, as all the points made, and all the authorities cited, are fully noticed in the judgment of the Court, which was now delivered by

LORD TENTERDEN, C. J.—This was an application for a certiorari to remove into this Court a rate made by the commissioners of sewers for the Tower Hamlets, in order to its being quashed. The rule was applied for on the part of the inhabitants of the parish of Hackney, and the objection made to the rate was, that the rate was imposed upon the whole district under the jurisdiction of these commissioners, namely, the whole district of the Tower Hamlets, ratably and proportionably; whereas it was contended, the rate ought not to be made generally upon the whole district, but ought to be, as until a very late period indeed it had been, so far as the books and records of the commissioners go, a rate made separately upon several distinct parts of this district, called, or usually denominated, levels. It appeared upon the affidavits, that the parish of Hackney, with the exception of a very small part, was so situated that its drainage was into a natural brook which communicated with the river Lea, so that the drainage of that district could be carried on, and had in fact been carried on hitherto, at a very moderate expense. The other levels

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of the district which lay nearer to the river Thames, and which were more populous, and great parts of them entirely covered with houses, were drained by means of covered sewers, erected and maintained at a very heavy expense; and it was contended that it was unjust to charge the inhabitants of Hackney, who derive no benefit from those expensive sewers, with the maintenance of them, but that they ought to be separately rated, as they previously had been, in which case the burthen on them would be much lighter: whereas the rate in question had the effect of charging them with the maintenance of sewers from which they derived no benefit. In support of the rate it was contended, not that the fact was not as alleged by the parties applying, but that by law the commissioners of sewers of this district, called the Tower Hamlets, could not do otherwise than make one equal pound rate upon all lands and all tenements within the district over which their commission extends: that they were bound by law so to do. Now it is certain that if any such obligation did exist by law, the law would in this case, and probably in many others also, work considerable injustice. It was suggested to us at the bar, and the two cases that I shall mention were instances of it, that in many other districts the rate is made, not upon the whole district, but that, under the authority and jurisdiction of the commissioners, the district is divided into several parts, which are usually denominated levels, and the inhabitants of each particular level are charged with the maintenance of the sewers within that level, which are the only sewers from which they derive benefit. If, therefore, we should hold this rate to be good, we should not only overturn that practice which has prevailed in this district called the Tower Hamlets for many years down to a very recent period, but we should also be deciding in all the other cases in which



separate rates are made for separate and distinct levels, that all those rates are bad, and ought to be quashed. It appeared to us to be very important that we should, at least, be sure we did right before we came to such a decision, and therefore we took time to consider of it; and upon consideration we are all of opinion that the law is not as was contended in support of this rate, but that it is competent to persons acting under this commission to do that which was formerly done in this district, and still continues to be done in many others, namely, to subdivide their districts, and rate the inhabitants of the separate parts separately; so that the inhabitants of each part may contribute to the expense of maintaining those sewers only from which they derive benefit. This is perfectly consistent with the principle which has always been laid down and generally acted upon. I do not speak now with reference to this particular question, which is now raised for the first time. The principle always laid down and generally acted upon is, that no person is to contribute to the expense except those who derive profit or benefit from it. This general principle is very distinctly noticed in *Rooke's* case (a). The point now before the Court was not the point in question there; the point there was, whether a particular person, the owner of particular land, a plot of seven acres, which had usually maintained a particular bank, was alone bound to repair the bank; or whether the obligation to repair should be cast upon the owners of a district containing about 800 acres, which was said to be within the same level, and protected by the bank. The point decided was, that it ought to be cast upon all the occupiers of all the 800 acres that were within the level. Reference was there made to the statute of 6 Hen. 6, c. 5, which is one of the old statutes of sewers prior to

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(a) 5 Co. Rep. 99, b. 2d resolution.

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the statute of 23 *Hen.* 8, c. 5; and the language of that statute is somewhat different from the language of that of 23 *Hen.* 8, c. 5, and perhaps shews more distinctly the power of the commissioners as well as their duty, (for their powers and their duties are equivalent,) to rate separately according to the maintenance of the particular works or sewers from which the parties derive benefit. The direction in the statute is, "No person shall be exempt from the rate, whatever his estate or condition may be, whether he be rich or poor, or of whatever condition, estate, or dignity he may be, who derives or receives defence, profit or protection from the aforesaid walls, ditches, gutters, barriers, causeways," and so on. Not that all who derive benefit from the works *within the district*, but that all who derive benefit from the particular works there mentioned, shall be chargeable to them. That case also furnishes an instance, and is one of those to which I before alluded, of the commissioners of a large district subdividing their rates into parts on particular levels; for the rate in *Rooke's* case was made by commissioners who had a commission to survey all walls, and so forth, in the River of Thames, in the counties of Essex and Kent. Now if they had been bound to make one entire rate, the inhabitants of the county of Kent on one side of the Thames might have been charged with the repairs of sewers and drains which were in the county of Essex on the other side; and it is quite impossible to suppose that any thing of that kind should have taken place. There is another case which it may not be improper to mention, that of *Stafford v. Hamston*(a). There a rate was made by the commissioners of sewers for the city and liberty of Westminster, and the parish of St. Margaret was rated by a separate rate by those commissioners, being one of the parishes

(a) 5 J. B. Moore, 608; 2 Brod. & Bingh. 691.

within their jurisdiction. The sewer, towards the expense of which the plaintiff was assessed, was in the parish of St. Margaret. The plaintiff was an inhabitant of Knightsbridge, and she derived no benefit from the sewer to the repairs of which she was charged. It was held that it was competent for her, in an action of trespass brought against the person acting under the warrant of the commissioners, to prove that fact, and evidence of the fact having been rejected at nisi prius, the Court granted a new trial. The case of *Netherton v. Ward* (a) supplies another instance in which the commissioners had subdivided their district; and in that of *Masters v. Scroggs* (b) it was conceded that the person assessed was not liable, unless he actually derived, or was likely to derive benefit from the works towards the expense of which he was charged. There the commissioners of sewers had assessed a person in respect of drains which communicated with other drains that fell into the main sewer; but in point of fact the level of his drains was so much above the sewer, that the stopping of the sewer could not possibly throw back the water so as to injure his premises; and, therefore, as he was not, and did not appear likely to be benefited by the works, he was held not liable to the assessment. For these reasons, therefore, without going further into the subject, we are of opinion that the commissioners have done wrong in making one rate for the whole district, which would work the injustice to which I have alluded. It was competent for them by law to rate separate parts within their jurisdiction and authority, in the same manner as had been long previously done. A great deal of reliance was placed in the argument on the word "level," which is found in the report of *Rooke's* case (c), and in which it is said that all who

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(a) 3 B. &amp; A. 21.

(b) 3 M. &amp; S. 447.

(c) 5 Co. Rep. 95, b. The  
word "level," though used in the

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are within the *level* are to contribute. That is very true; but the question is what is the meaning of the word "level." Now that word does not occur in the act of parliament; neither is it to be found in the commission. If we were to understand the word "level" in the sense sought to be attributed to it in this argument, we should make it an artificial division of the land; whereas, according to its natural import, the word denotes, not an artificial division of the land, but the peculiar natural character and situation of it. So understood, all those cases, and all those expressions, which shew that the rate is to be made equally upon all the inhabitants of the level, will stand untouched by our decision. The rule, therefore, for the certiorari must be made

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special verdict in that case, does not appear to be adopted by the Court. The resolution there is, "that the statute will have all who are in danger and are to

receive benefit (*et que sont a prendre commodit*) by the making of the banks to be contributors; for *qui sentit commodum sentire debet et onus*."

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**CHANTER, clerk, v. GLUBB, clerk, and another.**

The owner of tithes which are retained by the occupier of the land under composition from year to year, is ratable to the repair of the highways as occupier of tithes.

**THIS** was an action of trespass for seizing and impounding two cows of the plaintiff, to which the defendants pleaded the general issue. The cause came on to be tried at the Summer assizes, 1827 (*a*), before the Lord Chief Justice *Best*, upon mutual admissions of all the facts, when a verdict was found for the plaintiff with one shilling damages, subject to the opinion of this Court on the following case:—

(*a*) Counsel for the plaintiff, *Coleridge*; for the defendants, *Wilde*, Serjt., and *Manning*.

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Before and at the time of making the assessment hereinafter mentioned, and also before and at the time of the issuing of the warrant hereinafter mentioned, the plaintiff was the lessee for years of the tithes of the parish of Hartland, in the county of Devon, under a grant of them by deed from the impropiators thereof. Under this lease the plaintiff did not take the tithes in kind, nor did he demise or grant them to the respective occupiers of the lands from which they accrued, or to any other person or persons by any deed or deeds, but he compounded for them with the respective occupiers by several parol agreements, under which they retained the tithes accruing on their respective lands to their own use with the remaining nine parts, from which no severance in fact took place. The parol agreements endured from year to year, and were considered and treated by the parties as determinable only by six months' notice. Under these agreements the tithes were not bargained and sold when at maturity, but the agreements were prospective, and had no reference either to any specific mode of cultivating the lands, or to the amount of produce in any particular year. The composition moneys of the tithes so retained were, by the agreements, payable half yearly. The assessment above alluded to was a composition in money, in lieu of the statute duty in kind, duly assessed upon the occupiers of lands, tenements, woods, tithes and hereditaments within the said parish, for the amendment and preservation of the public highways in the same parish, and the plaintiff was therein charged in the sum of 11*l.* 17*s.* as his share and proportion of the said composition, in respect of his occupation of the tithes above mentioned. The payment of the said assessment, the amount of which was not in dispute, was duly demanded and refused. The defendants were, at the time of the

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conviction hereinafter mentioned, and of the issuing of the said warrant, justices of the peace in and for the county of Devon. Upon the complaint of the surveyors of the highways of the parish, the plaintiff was, after due summons, hearing and proof, convicted of the non-payment; and after order and refusal to pay the same, the warrant of seizure was made, and the seizure took place. The action was brought after a month's notice, and within the proper time for that purpose. The question for the opinion of the Court is, whether, under the circumstances, the plaintiff was liable to the payment of the composition in lieu of statute duty, as an occupier of tithes within the said parish. If the Court shall be of opinion in the affirmative, then a verdict to be entered for the defendants; if in the negative, then the present verdict to stand.

*Coleridge*, for the plaintiff. It must be conceded that the only mode in which tithes can pass is by deed; though according to Bacon's Abr. (a) a doubt seems to have been at one time entertained, whether a lease of tithes for one year only might not be by parol. The real question, however, is, who is the visible occupier, and how the surveyors of the highways are to ascertain who it is they are to assess. [*Bayley*, J. Must not they know whether the occupier is entitled to nine-tenths of the produce or to the whole?] Considerable difficulties might be imposed upon surveyors if they were bound to ascertain the legal title. Suppose a feme covert impropriatrix to have executed a lease of tithes; notwithstanding the apparent title, the lease would be void. It is, therefore, safer to leave it to the surveyors merely to see who in point of fact is actually receiving the tithes. [Lord Tenterden, C. J. If *Rex v. Lambeth* is rightly re-

(a) Bac. Abr. Tythes, (Y).

ported in *Strange* (a) there is an end of the case.] From the report of that case in 8 *Modern* (b) it appears that the lessee held under a parol demise. Therefore there could be no ground for charging him. [*Bayley*, J. There the farmer was considered as every harvest buying his tithes. Do you say that the bargain passes an interest?] The case finds that the occupiers retained the tithes, which shews that they were possessed of an interest in the tithes. [*Parke*, J. Suppose there had been a modus in this parish, would not the rector have been occupier of the tithes in respect of which the modus was paid, and is this any thing more than a temporary modus?] This question was raised in *Rex v. Justices of Buckinghamshire* (c), but the point was not decided.

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*Manning*, contra. *The Queen v. Bartlett* (d) shews that the occupiers of the land compounding for their tithes are not occupiers of the tithes. [He was here stopped by the Court.]

LORD TENTERDEN, C. J.—In strictness there can be no occupier of tithes, certainly not when tithes are compounded for. The word “occupiers,” therefore, in the statute, must be used to denote the person who receives the benefit of tithes.

BAYLEY, J.—It is quite clear in case of poor rates, and it has been lately held in the case of *Rex v. Lacy* (e), that a money payment substituted for tithes by an enclosure act is ratable *as tithes* to the repairs of the high-

(a) 1 *Str.* 525.

(b) 8 *Mod.* 61.

(c) 2 D. & R. 689; 1 B. & C. 485.

(d) 16 *Vin. Abr.* Poor Rate (F) 4.

(e) 8 D. & R. 457; 5 B. & C.

702; *Rex v. Boldero*, 6 D. & R. 557; 4 B. & C. 467. And see

*Rex v. The London Gas Company*, 2 M. & R. 12, 19.

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ways (a). Here the owner of the tithes does not grant them away, but excuses the setting of them out. It is in reality selling the tithes.

LITLEDALE, J. concurred.

PARKE, J.—The doubts thrown out in *Rex v. The Justices of Buckinghamshire* are removed by the discussion in *Rex v. Lacy*.

Judgment for the defendants (b).

(a) It has been held that no action is maintainable by the overseers of the highways against the parties rated, for nonpayment of the sums assessed, there being a specific mode of proceeding pointed out by the act. *Underhill v. Ellicombe*, Macl. & Younge, 450.

(b) Half a year's notice ought to be given to determine a composition for tithes, such notice expiring at the same period of the year as that at which the composition began. *Bishop v. Chichester*, 4 Gwill. 1816, and 2 Brown, Cha. Ca. 161; *Wyburn v. Tuck*, 1 B. & P. 458. And see *Fell v. Wilson*, 12 East, 85. It is true that in *Wyburn v. Tuck*, *Erye*, C. J. expressed a different opinion, and appears to have said, "The analogy between land and tithe does not appear satisfactory to me; land is either taken on a holding from Lady-

day, or from Michaelmas, or from some other time, and then notice to quit must be given accordingly. But if a composition is to be determined on any just principles, the notice must be given from a period suitable to the nature of the tithes, and with relation to the manure and cultivation of the land. There must be such a rule as will enable the tenant to cultivate his land in the manner most beneficial to himself, accordingly as he is to pay a composition or to pay in kind." 1 B. & P. 463. The inconvenience here pointed out seems, however, to be even less than that to which every tenant from year to year is exposed, by reason of his liability to be ejected by his landlord, not from a portion, but from the entirety. In either case, the difficulty, whenever anticipated, may be obviated by a special agreement.





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## The KING v. TIZZARD.

**INFORMATION**, in the nature of a quo warranto, for usurping the office of alderman of the borough of Weymouth. Plea: that King *Geo. 3*, by charter, bearing date, &c. granted that in the borough there should be one mayor, an indefinite number of aldermen, two bailiffs, and twenty-four chief burgesses, and that every person having served the office of mayor should become an alderman for life; and that defendant, in 1804, was duly appointed to, and served the office of, mayor, and so became an alderman. Replication: that by the said charter it was granted that the mayor, aldermen, bailiffs, and chief burgesses might make byelaws; and that they should have a recorder; and that the mayor, recorder, and bailiffs, or any two or more of them, of whom the mayor or recorder should be one, should hold sessions; and, further, that the mayor, aldermen, bailiffs, burgesses, and commonalty, should have, within the borough, one discreet and fit man, who should be, and be named, the common clerk of the borough, to continue in the same office during the pleasure of the mayor, aldermen, and bailiffs; that afterwards, and after defendant became an alderman, the office of common clerk became vacant, and defendant so being an alderman, was, by the then mayor, aldermen, and bailiffs, nominated, elected, and appointed, for the common clerk of the borough, to continue in the same during the pleasure of the mayor, aldermen, and bailiffs; that defendant took the oaths, and became and was common clerk; wherefore, &c. There were two other replications substantially the same, and a fourth, which, after stating the appointment of defendant to the office of common clerk, and his acceptance of that office, alleged, that at the time when de-

The common clerk of a borough is appointed by the mayor, aldermen, and bailiffs, removable at their pleasure, and with a salary variable at their pleasure; and it is his duty to attend the corporate meetings and take minutes of the proceedings.

The office of such common clerk and that of alderman are incompatible; and the acceptance of the former vacates the latter.

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fendant was so elected, and took upon himself the said office, a yearly salary of 10*l.* was payable and paid by the mayor, aldermen, bailiffs, burgesses, and commonalty, to the common clerk for the time being, subject to be increased, diminished, or withdrawn altogether, by the mayor, aldermen and bailiffs, at their pleasure; and that the offices of alderman and common clerk being, by reason of the premises, incompatible with each other, defendant thereby then and there resigned and vacated his office of alderman. The fifth replication alleged, that it was the duty of the common clerk to attend and be present, as such common clerk, at all corporate meetings of the mayor, aldermen, bailiffs, burgesses, and commonalty, and under their inspection and direction, to draw up in their books minutes and entries of their resolutions and proceedings; and then averred, as before, that the offices were incompatible, &c. Demurrer to the replications, and joinder in demurrer.

*Follett*, in support of the demurrer. The relator in his replications suggests three grounds upon which it will be contended that the offices of alderman and common clerk are incompatible with each other:—first, that the aldermen vote at the election of the common clerk; secondly, that when the defendant was elected common clerk, there was a salary attached to the office, which might be varied in amount, or withdrawn, at the pleasure of the mayor, aldermen, and bailiffs; and, thirdly, that the common clerk must be in attendance at corporate meetings, and take minutes of all the proceedings. Now, in order to prove that the two offices are incompatible with each other, it must be shewn, first, that the duties to be performed by the person holding the one office, are inconsistent with the duties to be performed by the person holding the other; and, secondly, that those duties are

of a public nature, so that the public will sustain an injury by their being improperly discharged. Unless both those points be made out, this Court will not interfere. For instance, a ministerial and a judicial office in the same court cannot be held by the same person; nor can the same person discharge the duties of expending public money, and of auditing his own accounts. But it has never hitherto been decided that a man may not hold two offices merely because by virtue of the one he has a voice in the election to the other; nor merely because in the one capacity he may have a voice in fixing the remuneration which he is to receive in the other. A candidate may vote for himself at an election of members of parliament, and at elections to most parish offices. A man may present himself to a church. In this case, the number of aldermen is indefinite; consequently, the influence of one in fixing the salary of the common clerk would be very trifling; and that is not a public duty. No objection can arise upon the ground of these offices being, one of them judicial, and the other ministerial, because the aldermen are not magistrates; nor can there be any reasonable objection to one member of the body being employed to take minutes of their proceedings. In Com. Dig. "Franchise," (F. 27), upon which the other side will probably rely, it is said, that the office of sworn clerk is void, if he be made an alderman; and Dyer, 332 b. is cited. But that is not a principal case, but a very brief note of one mentioned in the margin, where a town clerk was elected alderman with a view to the turning him out of the former place, the offices being incompatible; and the Court of King's Bench restored him to it: but the respective duties of the two offices are not mentioned (*a*). *Rex v. Pate-*

(*a*) The note in *Dyer* is, *verbatim*, this: — "*Boston*, being town clerk of B., was elected alderman, for the purpose of put-

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*mun* (a) is more analogous to the present case; but there the accounts of the town clerk were audited by the aldermen, and they were judicial officers, and the town clerk acted ministerially under them: and there Lord *Kenyon* said, "I do not think that the offices of alderman and town clerk are necessarily incompatible; for in some corporations," (as in the present), "the aldermen are not judicial officers." In *Milward v. Thatcher* (b), of the two offices held by the same person, the one was judicial, and the other ministerial; and upon that ground, expressly, the offices were decided to be incompatible.

*Campbell*, with whom were *R. Bayly* and *Barstow*, *contra*, was stopped by the Court.

Lord TENTERDEN, C. J.—I am of opinion that judgment must be given for the crown in this case. The fifth replication shews that it is the duty of the common clerk to attend the corporate meetings, and to take minutes of their proceedings. If that duty be not discharged faithfully, he may be removed from his office of common clerk, and upon that question he would have a vote in his character of alderman. In such a state of

ting him out of his office, because they were incompatible offices in one person. He prayed restitution to the office of town clerk, and it was granted."

(a) 2 T. R. 777. "Where the town clerk's accounts are allowed by the aldermen, or where a town clerk acts ministerially under the aldermen, who are judicial officers, the offices are incompatible; and the appointment to the former office is equivalent to amotion by the corporation from the latter office. And if

the person so appointed continue to exercise the office of alderman, the Court of King's Bench will grant an information in the nature of a quo warranto, against him."

(b) 2 T. R. 81. "A jurnt of the corporation of Hastings may be elected town clerk of the same corporation. But the two offices are incompatible, and the acceptance of the latter, though an inferior office, will vacate the former."

things he would fill the two incompatible situations of master and servant. That replication, therefore, is a good answer to the defendant's plea. Again, the fourth replication alleges that the common clerk has a yearly salary, subject to be varied in amount, or to be withdrawn altogether, at the pleasure of the mayor, aldermen and bailiffs. The defendant, as an alderman, would have to vote upon that question, a duty which I think he is not competent properly to perform, being at the same time the party to receive the salary. That replication, therefore, as well as the fifth, is a good answer to the plea.

BAYLEY, J.—I consider the two offices as clearly incompatible, where the holder cannot in every instance, without any improper bias on his mind, discharge the duties of each. Here, upon the two questions of motion and salary, the common clerk cannot, for the reasons mentioned by my lord, be competent so to discharge his duty as an alderman. His acceptance of the second office, therefore, has vacated the first.

LITLEDALE, J.—I entirely concur, for the reasons which have been given. I must also add, that I entertain great doubts whether the holding of two offices by the same person is ever contemplated in the charters granted to corporations.

Judgment for the Crown (a).

(a) *Parke, J.*, was gone to chambers.

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## The KING v. WILLIAM WILLIAMS.

Upon the trial of an indictment for a forcible entry, or detainer, under 8 H. 6, c. 9, or 21 J. 1, c. 15, the party dispossessed is not a competent witness for the prosecution.

Nor is it competent to the defendant to impeach the title of the party dispossessed.

Where such an indictment is brought before K. B. by certiorari, that Court is bound, upon conviction (b), to award restitution.

THIS was an indictment, under the statute 21 Jac. 1, c. 15 (a), for a forcible entry, alleging that the prosecutor, *William Lewis*, was interested in the premises for a term of years unexpired at the time of the offence committed, and concluding "against the form of the statute."

At the trial before *Vaughan*, B., at the summer assizes for the county of Monmouth, 1828, *Lewis*, the prosecutor, and the party dispossessed, was produced as a witness on the part of the prosecution. It was objected that he was incompetent, upon the ground that he had a direct interest in procuring a conviction, which would entitle him to judgment of restitution. The learned judge received the evidence, though not without doubts of its admissibility, and reserved the point. The evidence was material. The counsel for the defendant then tendered evidence to shew that the lease under which *Lewis* had entered into possession of the premises was invalid. This evidence the learned judge rejected, being of opinion that it was immaterial what estate the prosecutor had in the premises, the question not being one of title (c). The defendant was convicted. In Michaelmas term last,

(a) Which enacts, "that such judges, justices, or justice of the peace, as by reason of any act or acts of parliament now in force are authorised and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of *freehold*, of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall have the like and the same authority and ability from hence-

forth, (upon indictment of such forcible entries, or forcible withholdings, before them duly found,) to give like restitution of possession unto tenants *for terms of years*," &c. &c.

(b) As to restitution *before* trial, upon indictment found, *vide post*, 342 (b).

(c) "The justice or justices have power to summon a jury to try the forcible entry or detainer complained of; and, if the same

*Russell*, Serjt., moved for a rule nisi for a new trial upon both points. Upon the second point he contended, that although such evidence would be inadmissible upon an indictment for a forcible entry at common law, it became material, and therefore admissible, upon an indictment under the statute, where restitution was sought. The statute 21 *Jac.* 1, c. 15, provided for restitution to tenants for terms of years, and it became necessary, therefore, to inquire whether the party claiming restitution as a tenant for a term of years really had such an estate. Here the defendant was precluded from giving evidence to negative the averment of such an estate in the indictment.

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PER CURIAM.—The defendant can take his rule upon the first point only. The evidence tendered for him was properly rejected. It is conceded that such evidence would not be admissible in proceedings at common law, and the statute is only declaratory and in furtherance of the common law.

At the sittings in Banc after last Hilary term,

*Maule* shewed cause against the rule. The prosecutor was a competent witness. The only authority

be found by that jury, then the justices shall make restitution by the sheriff of the possession, *without inquiring into the merits of the title*; for the force is the only thing to be sued, punished, and remedied by them." 4 Bla. Com. 148.

"In an indictment for a forcible entry upon the possession of a lessee for years, proof of the force and of such possession is sufficient, although the indict-

ment also allege that the premises were his freehold, and such allegation is not proved." *Rex v. Lloyd*, Cald. 415.

"An averment in an indictment for a forcible entry, that the prosecutor was *seised*, is sufficient to found an application for a writ of restitution; and it need not be shewn by the prosecutor that he still continued to be *seised*." *Rex v. Dillon*, 2 Chitt. R. 314.

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cited at the trial in support of the objection to his testimony, was a very recent nisi prius decision in *Rex v. Beavan* (a). *Littledale, J.* certainly rejected the evidence of the prosecutor in that case, but seems to have entertained doubts upon the question; and the point was not brought before the full Court. The argument against the admissibility of the evidence is founded upon the assumption that judgment of restitution must necessarily follow a conviction in this case. But that is by no means clear; for it has been considered that although the statute was imperative upon the justices below to award restitution, it left that matter discretionary with the Court: *Dalton's Justice*, c. 134; *Rex v. Marrow* (b).

(a) 1 R. & M. 242, 2 Russell on Crimes, 601, where it was ruled by *Littledale, J.* that, "on an indictment for forcible entry and detainer, under the statutes of R. 2, and J. 1, the party aggrieved was not a competent witness."

(b) Cases temp. Hardw. 174. That was an indictment for a forcible entry under the statute; and the marginal note of that case is this:—"The Court has a discretionary power to award restitution immediately upon a removal of an indictment for a forcible entry by certiorari before plea; and therefore will put the defendant under terms to plead or demur in two days, and if he plead, to take short notice of trial." And Lord *Hardwicke*, C. J. is reported to have said, "There must be a writ of restitution unless the defendant pleads in a reasonable time. There are very few precedents to be found.

But by *Dalton's Justice*, c. 131, p. 314, it appears that the justices of the King's Bench, upon an indictment removed by certiorari, may award restitution; and by c. 134, p. 319, of the same book, it is said to be the law and course of the Court, 'That restitution is a thing in the discretion of the Court, and they will grant it or deny it as the justice or reason of the case shall require; and that it being a thing discretionary, the equity and reason of the case doth often incline the Court not to grant it where they may do it, especially if the party in possession shall offer to appear, and go to speedy trial of the right; and so, says the book, I have often observed it to be done.' And *Lee, J.* added, "The business of the Court is to reaise the party; so the words of the act are; and no damage can happen to the defendant from thence, for the Court, if he



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But even admitting such an assumption to be correct, the prosecutor is nevertheless a competent witness. The prosecutor in this case had no greater interest than prosecutors in many other cases have. The offence of forcible entry was not created such by statute; it existed at common law; and is an offence which the public at large have a direct interest in suppressing. Then a statute which gives a prosecutor a new benefit, as an encouragement to him to perform his duty, ought not to deprive the crown of his testimony, and be construed so as to defeat its own object. The owner of stolen goods, who has prosecuted the felon to conviction, is entitled to a writ of restitution under the statute 21 *Hen.* 8, c. 11 (*a*); and yet such prosecutors have always been admitted as competent witnesses. [*Parke, J.* That statute gives restitution where the felon shall be attainted "by reason of evidence given by the party robbed, or owner of the money, &c. or by any other by their procurement," and therefore expressly recognises the owner as a competent witness (*b*)]. The statute 17 *Geo.* 2,

shall appear to have right, may afterwards award a writ of restitution to the defendant."

(*a*) Repealed by 7 & 8 *Geo.* 4, c. 27; and by 7 & 8 *Geo.* 4, c. 29, s. 57, "to encourage the prosecution of offenders," it is enacted, that if any person guilty of any felony or misdemeanour under that act, in stealing, &c., or in knowingly receiving, any property, shall be indicted for such offence by, or on behalf of the owner of the property, or his executor or administrator, and convicted thereof, the property shall be restored to the owner or his representative, either by

writ of restitution to be awarded, or summary order to be made, by the Court before whom the offender shall be tried. This makes some important alterations in the law, as the former statute extended to prosecutions of thieves only, and not receivers, and did not include property lost by false pretences, or by other misdemeanours. The owners of stolen goods have always been admitted as competent witnesses under the new statute.

(*b*) This observation, applicable to the old statute, on which the cases adverted to had proceeded, of course decides nothing

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c. 40, leaves an option in the judge either to inflict corporal punishment, or to impose a fine; yet it has been held that the expectation of a share of the fine did not render a witness incompetent (a). So, a witness entitled to a share of a penalty under the statute 21 Geo. 3, c. 37, has been held to be a good witness on an indictment under that statute. *Rex v. Teasdale* (b). So, in an action upon the statute 2 Geo. 2, c. 24, for bribery at an election, a party is a competent witness, although an action be pending against himself for bribery at the same election, and although he intend to avail himself, as a first discoverer, of the defendant's conviction, in order to relieve himself from the penalty for which he is sued. *Heward v. Shipley* (c). So, on a prosecution for penalties under the statute 9 Ann. c. 14, s. 5, the loser of money at cards is a competent witness to prove the loss, *Rex v. Luckup* (d); and on a prosecution under the statute 23 Geo. 2, c. 13, s. 1, for seducing artificers to go out of the kingdom, the prosecutor is a competent witness, although entitled to a moiety of the penalty. *Rex v. Johnson* (e). Indeed, it seems to be a general principle in all criminal prosecutions, that the interests of the public, for whose protection, mainly, the proceedings are instituted, shall prevent those circumstances from operating as a disqualification of the witness, which would clearly render him incompetent in a civil suit. It is upon this principle that rewards payable on the con-

as to the new statute 7 & 8 Geo. 4, cap. 99, though in force at the time when the principal case was argued.

(a) By Lord *Kenyon* in *Rex v. Cole*, 1 Esp. N. P. C. 169; but that learned judge had at one time entertained a different opi-

nion: see *Rex v. Blackman*, *ibid.* 95.

(b) 3 Esp. N. P. C. 68.

(c) 4 East, 180. But the point had shortly before been considered doubtful; see *Edwards v. Evans*, 3 East, 451.

(d) Willes, 425, (c).

(e) *Ibid.*

viction of offenders, whether given by statute, or offered by the crown or by a private individual, have never been held to disqualify the witnesses expecting to receive them. Why should the principle, general as it is in its application, be held not to apply to a prosecution for a forcible entry? There seems no good reason for making such an exception; and without such an exception the prosecutor in this case was a competent witness, and his evidence was properly admitted.

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*Russell Serjt. and Talfourd*, *contra*. There is no real distinction between the circumstances which disqualify witnesses on the ground of interest in civil and criminal proceedings. Generally speaking, undoubtedly, a prosecutor is not incompetent, *quà* prosecutor; because the proceedings, though instituted by him, are carried on in the name of the king, and for the benefit of the public; and he is considered in point of law as having no interest in the event. But as soon as it appears that he has a direct interest in the event, he becomes incompetent; not because he is prosecutor, but because he has such an interest as renders it dangerous to act upon his evidence. Prior to the cases of *Bent v. Baker* (a), and *Smith v. Prager* (b), in which the rule which now prevails was first established, namely, that no mere interest in the subject-matter, but only a direct interest in the event of a suit, shall disqualify a witness, the decisions upon the question, what was a disqualifying interest, had varied, both in the civil and the criminal Courts. But the rule is now well understood and established, and is the same in civil and criminal cases, with some exceptions in the latter, every one of which is grounded either on the express words or obvious meaning of the statute by which it is created. The statute

(a) 3 T. R. 27.

(b) 7 T. R. 60.

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21 *Hen. 8*, c. 11, for instance, which has been referred to as giving restitution of stolen goods, in terms contemplates the admission of the testimony of the party robbed; and the various statutes which gave rewards had all of them the same effect, without which, indeed, they would have been wholly nugatory. In *Heward v. Shipley* (a) Lord *Ellenborough* expressly describes these cases, and that of a party robbed under the statute of *Winton* (b), as cases of parliamentary capacitation. In *Rex v. Boston* (c), *A.* having brought an action against *B.*, the latter filed a bill in equity against him for a discovery and injunction, and for an account; to which *A.* having put in his answer, denying the allegations of *B.*, which involved the merits of the suit at law, the injunction was dissolved; on which answer *B.* indicted *A.* for perjury; and the indictment and action coming on to be tried at the same assizes, the indictment standing first, it was held, that *B.* was a competent witness to prove the perjury, because he could not avail himself of the conviction of *A.* in any civil proceeding between them, either at law or in equity. In that case the principal authorities relating to the competency of witnesses in criminal proceedings were reviewed; and the rules of evidence were considered, as they have ever been considered, as resting upon the same principles both in civil and criminal cases. It is laid down by Lord *Hale*, with reference to an indictment for treason, that "if any man hath the promise of the lands or goods of the party, if attainted, he is no lawful witness to prove the treason" (d). So *Buller, J.* says, "In an indictment for perjury on the statute of *Elizabeth* (e), the person injured cannot be a witness, because the statute gives him 10*l.*; but in an indictment

(a) 4 *East*, 180.

(c) 4 *East*, 572; 1 *Smith*, 202.

(b) 13 *Ed. 1*, st. 2, c. 1, 2, repealed by 7 & 8 *Geo. 4*, c. 27.

(d) 1 *Hale*, P. C. 302.

(e) 5 *Eliz.* c. 9.

at common law he may be a witness" (a). This distinction applies expressly to prosecutions for forcible entry at common law and on the statute, and is decisive of the question now before the Court. In the former the prosecutor is a competent witness, because he has no direct personal interest in the event, he is interested merely in the subject-matter, as one of the public. In the latter he is incompetent, because he has a direct personal interest in the event; he is interested in procuring a conviction and thereby obtaining restitution of his property, which the statute gives him only in the event of a conviction. The common law proceeding, which any individual may institute, is abundantly sufficient for the protection of the interests of the public; and where a party chooses to indict upon the statute, which he can do only for the purpose of promoting his personal interest, and of obtaining a private advantage, he must achieve that purpose by means of the testimony of others, and not of his own.

The Court took time to consider of their judgment; which was now delivered by

BAYLEY, J.—The defendant in this case was indicted for a forcible entry; and the question raised before us was, whether the prosecutor, the party grieved, the party upon whose possession the forcible entry was made, was or was not a competent witness. The indictment was not framed at common law, but upon the statute 21 Jac. 1, c. 15, which gives to justices, in cases of forcible entry on the lands or tenements of tenants for terms of years, the same power of awarding restitution of possession, as was given to them as to tenants of the freehold by the statute 8 Hen. 6, c. 9, s. 3. That statute enacts

(a) Bull. N. P. 289.

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that justices of the peace shall have authority and power to inquire, by the people of the same county, as well of them that make such forcible entries in lands and tenements, as of them which the same hold with force; and if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to reseise the lands and tenements so entered or holden, as afore, and shall put the party so put out, in full possession of the same lands and tenements so entered or holden as before. It was upon this provision for re-seising and restoring the premises, that the objection to the prosecutor's evidence was grounded; and upon the construction of it the question in the case depends; because if the prosecutor was entitled, as a matter of right, to restitution, he clearly had a direct interest in the event, and was not a competent witness. To this objection two answers were given: first, that although the justices below would have been bound to award restitution upon a conviction before them, the Court of King's Bench was not; and secondly, that the legislature could not be supposed to have intended, when conferring an additional benefit, to narrow the means by which the offence was to be proved; and, that as the prosecutor would have been a competent witness before the statute, he continued to be so still. The first point did not seem to be much relied on, for it was not much pressed in argument. One case only was cited in support of it; and that was clearly distinguishable from the present (a). And when it is considered that the writ of certiorari merely substitutes this Court for the Court below, it follows that whatever ought to have been done by the Court below, if the case had remained there, ought also to be done by this Court, when the case is

(a) *Rex v. Marrow*, Cas. temp. Hardw. 174. *Vide ante*, 342 (b).

removed hither (a). The second point was that mainly relied on; and it was insisted, that by analogy to cases of rewards, and other statutory benefits, it must be considered as a rule in all criminal cases, that by a statute conferring a benefit upon a person who, but for that benefit, would have been a good witness, his competency is virtually continued, and he is as much a witness after the benefit is conferred as he was before. In cases of rewards the rule is clear, on the grounds of public policy, with a view to the public interest, and consistently with the very principle upon which such rewards are given. The public have an interest in the suppression of crimes, and in the conviction of criminals. It is with a view to excite greater vigilance and activity in apprehending, that rewards are given: and it would defeat the object of the legislature, by means of those rewards to narrow the means of conviction, and to exclude testimony which would have been otherwise admissible. It is upon the principle, therefore, that the exclusion of the testimony of persons entitled to rewards would be inconsistent with the statutes by which the rewards are given, and against the grounds of public policy, that their competency has been held to be virtually continued. The cases of rewards offered by

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(a) "Although regularly the justices only who were present at the inquiry, and when the indictment was found, ought to award restitution; yet if the record of the presentment or indictment shall be certified by the justice or justices into the King's Bench, or the same presentment or indictment be removed and certified thither by certiorari, the justices of that Court may award a writ of restitution to the sheriff,

to restore possession to the party expelled; for the justices of the King's Bench have a supreme authority in all cases of the crown." Dalton, c. 44.

"An indictment of forcible entry may be removed from before justices of the peace into the court of B. R. coram Rege, which court may award restitution." 11 Co. Rep. 65. And see *Reg. v. Hake*, post, 353.

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private individuals, referred to in the argument, stand upon a different principle, namely, that the public have an interest, upon public grounds, in the testimony of every person who has any knowledge of the commission of a crime, which interest cannot be divested by any act which any private individual may do. The argument founded upon the right of restitution of stolen goods under the statute 21 *Hen.* 8, c. 11, notwithstanding which the owner, who is entitled to such restitution, has always been admitted a witness, was answered during the discussion by a reference to that statute by my brother *Parke*; because that statute expressly provides, that if a felon who robs, or takes away any money, goods, or chattels, be attainted *by reason of evidence given by the party robbed, or owner of the money, &c.*, or by any other by their procurement, the party so robbed, or owner, shall be restored to his money, &c., and the Court shall award them writs of restitution. In *Heward v. Shipley* (a), which followed and was supported by *Bush v. Ralling* (b), and *Phillips v. Fowler* (c), the witness was held to be competent, notwithstanding his interest, upon the spirit and principle of the statute 2 *Geo.* 2, c. 24; and Lord *Ellenborough*, with his peculiar characteristic mode of expression, said, he thought that the statute had given the witness *a parliamentary capacitation*. The two cases that were cited of *Rex v. Luckup* (d) and *Rex v. Johnson* (e) deciding, that the loser of money at cards in a prosecution for gaming, under the statute 9 *Ann.* c. 14, s. 5, and the informer in a prosecution for seducing artificers, under the statute 23 *Geo.* 2, c. 13, s. 1, were competent witnesses on the part of the crown, being confined, as I apprehend

(a) 4 East, 180.

(b) Sayer, 289.

(c) Ibid. 291.

(d) Willes, 425, (c).

(e) Ibid.



they are, to cases of indictments, prove really nothing for this case; because the event of the prosecution, whatever it might be, could not, in either case, work either prejudice or advantage to the witness. The penalty is not recoverable by means of an indictment in either case; an action must be brought for it; and a conviction on an indictment would be no evidence in such an action. Besides, neither the loser of the money in the one case, nor the prosecutor of the indictment in the other, is exclusively entitled to the penalty; for in the former it is given wholly to any person who shall sue for the same by action, and in the latter one moiety to the king and the other to any person who shall sue for the same. The prosecution, in both cases, is to be by indictment or information; and in the one case expressly, and in the other impliedly, the penalty is to be recovered by action: and the form of both those cases shews clearly that they were proceedings by indictment or information. The case of *Rex v. Teasdale* (a) was an indictment under the statute 21 Geo. 3, c. 37, s. 1, for exporting machinery used in the manufactures of this country. By that statute the offence is made indictable, and the offender is to forfeit the machinery, to pay a fine of 200*l.*, and to be imprisoned for 12 months, and until the fine is paid; and, by section 7, the forfeitures, where it is not otherwise provided, are to go to the informer. The informer was called as a witness, and objected to on the ground of interest; but Lord *Kenyon* overruled the objection, saying, that the point had been decided long before in a case in *Burrow*, soon after Lord *Mansfield* came into the Court, as to cases of bribery. The reference to *Burrow* is a mistake; and the case to which Lord *Kenyon* alluded is probably that of *Bush v. Ralling* (b), which was decided in the interval between the

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(a) 3 Esp. N. P. C. 68.

(b) Sayer, 289.

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death of Sir *Dudley Ryder*, and the appointment of Lord *Mansfield*, in Trinity term, 1756, when there was no chief justice. It was an action upon the bribery act, 2 *Geo.* 2, c. 24, and the party bribed was admitted a witness. Upon motion for a new trial, two objections were made to his admissibility: first, that he was particeps criminis, and, secondly, that the tendency of his evidence was to relieve himself from penalties and disabilities. *Dennison*, J., in delivering the opinion of the Court, in which he said the late chief justice had concurred, after observing that there were many cases in which a particeps criminis was a competent witness, thus expressed himself: "But another answer deducible from a clause in 2 *Geo.* 2, c. 24. may be given. That clause (a) discharges a discoverer, if the person discovered be thereupon convicted, from all penalties and disabilities he had incurred. This seems to be a legislative declaration, that one person offending against this act may be a witness against another; for it is not probable the legislature should intend to discharge one offender, upon his discovering another offender against it, in such a manner that the latter be convicted, without intending at the same time that the former should be a witness against the latter." That decision, which was acted upon as clear and unquestionable by Lord *Mansfield* and the Court in a subsequent case of *Sutton v. Bishop* (b), explains satisfactorily the feeling of Lord *Kenyon* in *Rex v. Teasdale* (c), and the principle upon which he acted. He considered the term "informer" in the 21 *Geo.* 3, c. 37, as equivalent to the term "person discovering" in the 2 *Geo.* 2, c. 24, and that as it had been decided that the person described as "the person discovering" in the one case was intended to be made a witness, the same

(a) Section, 8.

(c) 3 *Esp. N. P. C.* 68.

(b) 4 *Burr.* 2283; 1 *W. Bla.* 665.

intention must be presumed as to the person described as "the informer" in the other. Both were cases of secrecy, and the public had an interest in the discovery and punishment of the offenders. This, therefore, was a case in which it was implied, from the tenor and provisions of the statute, that the legislature intended to render a person competent who otherwise would not have been so; and instead of breaking in upon the general rule, merely establishes an exception. The general rule in all proceedings criminal as well as civil is, that a person interested in the event is not a competent witness. Here the prosecutor was interested in the event; because a conviction would entitle him to judgment of restitution. Then is there any thing in the nature of the case from which we are warranted in implying such an exception as was implied in the cases to which I have referred? Nothing. The interests of the public may still be vindicated by a common law indictment; and there is nothing from which the inference can be fairly drawn, that it was with a view to the interests of the public, and not for the private advantage of the party grieved, that the provision for restitution was introduced into the statute. For these reasons we are of opinion that the evidence of the prosecutor ought not to have been received; and, therefore, that the rule for a new trial ought to be made absolute.

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#### Rule absolute (a).

(a) Shortly before Hilary term, 1826, a declaration in ejectment, on the demise of *Edward Hannam* and *Wadham Wyndham*, was served upon *John Hake*, the tenant of a farm at Buckland St. Mary, in the county of Somerset. *Hake* having appeared to this

ejectment, signed a cognovit, by the terms of which he agreed to give up possession of all the lands in course for a wheat crop on the 29th of September, 1826, and the remainder of the premises on the 6th of November following. Possession having been de-

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manded and refused, judgment was entered up in Michaelmas term, and a writ of habere facias possessionem was issued; under which, after considerable difficulty, occasioned by the resistance of *Hake* and his companions, *Hake* was removed from the premises. On the 21st of June following, *Hake*, with several other persons, broke into the house, turned off the cattle, and re-took possession of the premises. At the following Bridgewater assizes, (August, 1827) a bill of indictment was preferred and found against *Hake* and his companions. In this indictment, the first count charged that the defendants on &c. with force and arms, unlawfully and with a strong hand had entered into certain messuages and lands, to wit, &c. situate &c., then being the freehold and in the possession and occupation of said *Hannam* and *Wyndham*, and had then and there, with force and arms, unlawfully, with a strong hand, and without judgment recovered, disseised said *Hannam* and *Wyndham*, and expelled and put out said *Hannam* and *Wyndham* from their possession of the said messuages and lands, and with force and arms from the day and year aforesaid, until the taking of this inquisition, had kept out and still did keep out said *Hannam* and *Wyndham* so disseised, expelled and put out as aforesaid, against the form &c. The second count charged that *Hannam* and *Wyndham* had been lawfully possessed

of certain other messuages and lands, to wit &c., situate &c., for a certain term of years then to come and yet unexpired, and that *Hannam* and *Wyndham* being so possessed thereof, defendants on &c., with force and arms, had unlawfully entered &c., and with force and arms had then and there unlawfully expelled and put out the said *Hannam* and *Wyndham* from the peaceable possession of the last mentioned messuages and lands; and that the defendants with force and arms them the said *Hannam* and *Wyndham* from &c., until the taking of this inquisition, from the possession of the last mentioned messuages and lands, with force and arms, wrongfully and unlawfully then and there had kept out, and still did keep out. The third count charged that the defendants on &c. with force and arms wrongfully, unlawfully, violently, and forcibly had entered into certain other messuages and lands, to wit &c., situate &c., then being in the peaceable possession of the said *Hannam* and *Wyndham*, and that the defendants had then and there with force and arms wrongfully, unlawfully, forcibly, and violently expelled, amoved, and put out the said *Hannam* and *Wyndham* from the possession of the last mentioned messuages and lands; and the said *Hannam* and *Wyndham* so expelled, put out, and amoved from the possession thereof, as aforesaid, with force and arms wrongfully, un-

lawfully, forcibly, and violently had kept from &c., until &c., and still did keep out.

Upon this finding, and upon an affidavit of the facts, *Manning* moved before *Burrough*, J. for an order of restitution, upon the authority of the cases collected in Com. Dig. *Forcible Entry* (D 4). The order was made; and the following warrant issued under the seals of the two learned judges:

"Somersetshire to wit, Sir *William Draper Best*, Knight, Chief Justice of our lord the king, of his Court of Common Pleas, and Sir *James Burrough*, Knight, one of the justices of our lord the king, of his said Court of Common Pleas, justices of our lord the king, assigned to deliver the gaol of the said county of the prisoners therein being, and also to hear and determine all felonies, trespasses and other evil doings committed within the same county: To the sheriff of the county of Somerset, greeting. Whereas, by an inquisition taken before us at Bridgewater, in the said county, on this present eighteenth day of August, in the eighth year of the reign of our said lord the king, upon the oaths of the Honourable *William Waldegrave*, *William Dickinson*, *George Edward Allen*, *John Goodford*, *Philip John Miles*, *William Hanning*, *Vincent Stuckey*, *William Hellar*, *Richard Thomas Combe*, *Jeffrys Allen*, *Jeffrys Thomas Allen*, *Thomas Shewell Bail-*

*ward*, *James Bennett*, *Robert Phippen*, *John Barrow*, *Francis Byrt Morgan*, *John Hugh Smyth Pigot*, *Thomas Savage*, *Reginald Henry Bean*, and *John Maddison*, esqrs.; and by virtue of the statutes made and provided in cases of forcible entry and detainer, it is found, that *John Hake*, late of the parish of Buckland St. Mary, in the county of Somerset, yeoman, and *Mary* his wife, *John Hake* the younger, late of the same place, yeoman, *John Pinner*, late of the same place, yeoman, and *John Hooper*, late of the same place, yeoman, on the 21st day of June, in the eighth year of the reign of our lord the king, with force and arms, unlawfully and with a strong hand did enter into certain messuages and lands, to wit, 10 messuages, 10 barns, 10 stables, 10 coach-houses, 200 acres of meadow, 200 acres of pasture, 200 acres of other land, situate, lying, and being in the county aforesaid, to wit, in the parish aforesaid, (following the description of the premises contained in the declaration in ejectment) then being the freehold and in the possession and occupation of *Edward Hannam* and *Wadham Wyndham*, and then and there unlawfully and with a strong hand, and without judgment recovered, disseised the said *Edward* and *Wadham*, and expelled and put out the said *Edward* and *Wadham* from their possession of the said messuages and lands; and with force and

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arms, unlawfully and with a strong hand, from the day and year aforesaid until the taking of that inquisition, have kept out and still do keep out the said *Edward* and *Wadham*, so disseised, expelled, and put out, as aforesaid; against the form of the statute in such case made and provided, and against the peace of our said lord the king, his crown, and dignity. As by the same inquisition more fully appeareth of record. Therefore on behalf of our said lord the king we charge and command you, that taking with you the power of the county, if it be needful, you go to the said messuages and lands and that the same you cause to be re-seised, and that you cause the said *Edward* and *Wadham* to be restored and put into their full possession thereof, according as they before the entry aforesaid were seised, according to the form of the said statutes. And this you shall in no wise omit,

under the penalty thereon incumbent. Given under our hands and seals, at Bridgewater, in the same county, the 18th day of August, in the eighth year of the reign aforesaid."

Under this warrant restitution was made by the sheriff to the prosecutors of the indictment; to which, at the ensuing Spring Assizes, the defendants pleaded guilty.

The finding of a bill of indictment for a forcible entry is necessary to give the Court jurisdiction to award restitution; but as such a bill is commonly found wholly or in part upon the testimony of the party entitled to restitution, the Court will not award restitution upon an indictment found, unless a sufficient case for their interference be made out by affidavit.

And see *Rex v. Marrow*, Cas. temp. Hardw. 174, part of the judgment in which case is given in *Rex v. Williams*, the last preceding case, which see.

### MAYNE v. FLETCHER.

Production of the affidavit filed at the Stamp Office, and of a newspaper corresponding with that therein mentioned, is sufficient proof of publication, in an action or indictment against the proprietor for a libel.

**CASE** for a libel on the plaintiff, alleged to have been published by the defendant in a newspaper called *The Chester Chronicle*. Plea, not guilty; and issue thereon. At the trial before the Chief Justice of Chester, at the last Lent assizes, the question turned upon the proof of publication, under the following circumstances. The evidence was confined to the production of a certified

copy of the affidavit filed at the Stamp Office, pursuant to the statute 38 *Geo.* 3, c. 78, s. 1, in which the defendant was described as the printer and publisher of the newspaper in question, and of a newspaper containing the libel, the title of which, and the description of the printer and publisher, corresponded with those of the newspaper mentioned in the affidavit. It was objected, on the part of the defendant, that this was not sufficient evidence of publication, and that the plaintiff ought either to have produced the copy of the newspaper filed at the Stamp Office, or to have proved that the copy produced was published by the defendant. The learned Judge overruled the objection, and the plaintiff obtained a verdict, with leave for the defendant to move to enter a nonsuit.

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*Jones*, Serjt., now moved accordingly. The declaration necessarily alleged that the defendant published the libel in a newspaper called *The Chester Chronicle*; but there was no proof whatever to support that allegation. The affidavit filed at the Stamp Office did not at all prove the publication of the libel by the defendant; it proved, merely, that the defendant was the printer and publisher of a newspaper called *The Chester Chronicle*. The production of a newspaper so called, containing the libel, carried the evidence no further; in order to make out that the defendant published the libel, the plaintiff was bound to produce either a newspaper purchased of the defendant, or the copy filed at the Stamp Office, pursuant to the statute 38 *Geo.* 3, c. 78, s. 17. For all that appeared in this case, the paper containing the libel might have been surreptitiously obtained from the defendant's printing office, or might have been delivered from thence by mistake, which would clearly be

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no publication. *Rex v. Paine* (a). The statute 38 Geo. 3, c. 78, is entitled, "An act for preventing the mischiefs arising from the printing and publishing newspapers and papers of a like nature, by persons not known, and for regulating the printing and publication of such papers in other respects;" its principal object, therefore, was to secure to the public, in every case, a known and responsible publisher: but it clearly was not intended to relieve the plaintiff from all proof of publication by the defendant. The eleventh section of the statute provides that it shall not be necessary for the plaintiff to prove that the newspaper to which the trial relates was purchased at any house, shop, or office belonging to or occupied by the defendant, or his servant or workman, or where he usually carries on the business of printing or publishing such paper, or where the same is usually sold. But though that mode of proof of publication is dispensed with, another is substituted by the seventeenth section, which requires that every printer or publisher of a newspaper shall deliver to the commissioners of stamps one of the papers so published, signed by the printer or publisher, in his handwriting, with his name and place of abode; that the same shall be carefully kept by the commissioners; and that in case any person shall make application to the commissioners that such papers may be produced in evidence, the commissioners shall cause the same to be produced in Court. The intention, therefore, of the legislature was, that *the* newspaper signed by the publisher, and delivered to the commissioners, should be produced in evidence as proof

(a) 5 Mod. 167. "If a man deliver by mistake a paper out of his study, it is not a publication, though it be a libel." *Ibid.* And see *Algernon Sidney's* case 3 St.

Tr. 807, 4 St. Tr. 197. But he would probably be held to be liable *civilly* to the parties who suffered by his carelessness.



of publication, without which the provisions of that section become wholly nugatory; and the practice which has obtained since the passing of the statute in all proceedings against proprietors of newspapers, of producing that identical newspaper in evidence, shews that the profession and the public generally have put this construction upon the seventeenth section. *Rex v. Hart (a)*.

Lord TENTERDEN, C. J.—I see no ground for granting the present application. The eleventh and seventeenth sections of the statute are perfectly distinct from each other. The seventeenth section supplies the public with means of producing a copy of the newspaper, which they did not previously possess, and of which a party may not possess the means of producing any other copy; but it does not make that particular copy the only evidence of publication. The eleventh section provides that it shall not be necessary, after such affidavit, &c., shall have been produced in evidence against the person who signed and made such affidavit, or is therein named, and after a newspaper shall have been produced in evi-

(a) 10 East, 94. But it was held in that case, that the affidavit required by the statute, together with the production of a newspaper corresponding in every respect with the description of it in the affidavit, was not only evidence of the publication of such paper by the parties named, but was also evidence of its publication in the county where the printing of it was described to be. It seems impossible, therefore, to consider that case as an authority for saying that the production of the newspaper deli-

vered at the Stamp Office is necessary; on the contrary, it seems to be a decision the other way, and conclusive against the argument urged in the principal case. It has, however, been held that the newspaper delivered at the Stamp Office is conclusive evidence of publication to sustain an indictment; *Rex v. Amphlit*, 6 D. & R. 125; 4 B. & C. 35; and *Holroyd*, J. there observed, that "the very object of delivering a copy at the Stamp Office is, that it may be evidence against the proprietor."

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dence, entitled in the same manner as the newspaper mentioned in such affidavit, and wherein the names of the printer and publisher, and the place of printing, shall be the same as those mentioned in such affidavit, for the plaintiff or prosecutor to prove that the newspaper to which the trial relates was purchased at any house, shop, or office belonging to or occupied by the defendant, or where he usually carries on the business of printing or publishing such paper, or where the same is usually sold. Independently of the statute, a newspaper purchased at the house, shop, or office of the defendant, would be evidence of publication; but by the express words of the statute the plaintiff or prosecutor is exempted from the necessity of bringing such evidence, upon the production of the affidavit filed at the stamp office, and of a newspaper corresponding in certain particulars with that mentioned in the affidavit. In the present case the plaintiff proved all that was necessary to bring him within the terms of that exemption, and therefore the proof of publication was sufficient.

BAYLEY, J.—By the eleventh section, the production of a newspaper corresponding with the newspaper described in the affidavit, places the plaintiff in the same situation as if he had produced a newspaper purchased at the house, shop, or office of the defendant. Such evidence of publication is only *primâ facie*, and is liable to be rebutted by proof of fraud; but if not rebutted, it is clearly sufficient.

LITTLEDALE, J. concurred.

PARKE, J., was gone to chambers.

Rule refused.

**CASES**  
 IN THE  
**COURT OF KING'S BENCH,**  
 FOR THE USE OF  
**Justices of the Peace.**

TRINITY TERM, 1829.

The KING v. The Inhabitants of BOURTON-UPON-  
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UPON appeal against an order of two justices for the removal of *Henry Webb*, his wife, and their five children, from the parish of Stretton-upon-Dunsmore to the parish of Bourton-upon-Dunsmore, both in the county of Warwick, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The appellants admitted a *prima facie* settlement by birth in their parish, and then proved that the pauper had served more than forty days in a third parish, under an indenture of apprenticeship bearing date 26th April, 1813.

This indenture, the respondents contended, was void upon the following evidence.

The mother of the pauper, who was an illegitimate child, was directed by her husband, who was not the father of the child, to give a premium of 10*l.*, and no more. The master required 20*l.* This amount the mother refused to give, but came to a private under-

An undertaking by the mother of an apprentice, without the knowledge of her husband, to pay the master a sum of money beyond the premium inserted in the indenture and paid by the husband at the time of its execution, (the stamp on the indenture being sufficient for both sums,) does not make the indenture void under 8 *Anne*, c. 9, s. 39: the undertaking being void, and no fraud being practised on the revenue.

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standing with the master that he should receive something in addition to the 10*l.*, but what particular sum did not appear. It was also agreed that the sum of 10*l.* only should be inserted in the indenture, which was accordingly done. The stepfather paid the premium of 10*l.*, and the mother paid the further sum of two guineas and a half. Neither the apprentice nor the stepfather were privy to the understanding above mentioned, and never knew that a greater sum than 10*l.* had been paid; but the master was not aware that the agreement by the mother to give more than the 10*l.* was without the authority or privity of her husband. The indenture bore the proper stamp for any sum not exceeding 30*l.*

The question for the opinion of the Court is, whether or not the pauper was settled in the appellant parish.

*White*, in support of the order of sessions. The question in this case is, whether the consideration paid to the master is truly inserted in the indenture, so as to satisfy the requisites of the statute 8 *Anne*, c. 9, s. 35. That section enacts, that the full sum of money received (i. e. by the master) or in any wise, directly or indirectly, given, paid, agreed, or contracted for during the term, with or in relation to any apprentice, shall be truly inserted in the indenture, which shall bear date upon the day of the executin of the same. It is submitted that the requisites of that section have not been complied with in this case, and consequently that the indenture is void by s. 39 of the same statute, which declares, that every indenture, wherein shall not be truly inserted the full sum received, or in any wise, directly or indirectly, given, paid, secured, or contracted for, with or in relation to any apprentice, shall be void, and not available to any purpose whatsoever. It will be contended on the other side, that the additional sum given

by the mother having been paid after the execution of the indenture, could not in fact, and need not by law, be inserted in the indenture; and that the agreement to give that additional sum being made by the mother, without the authority or privity of her husband, was void, and therefore could not affect the indenture. Both these propositions may be true, and yet furnish no answer to the objection now relied on. The statute requires that the whole sum received, given, paid, agreed, or contracted for, shall be truly inserted in the indenture: here a sum was agreed for, paid, and received, which was not inserted in the indenture. The 32d section requires the duty payable in respect of the premium to be paid by the master; and the 35th section imposes a penalty upon every master receiving any premium not truly inserted in the indenture. The onus, therefore, of ascertaining that every thing is done strictly according to law is laid upon the master by the statute; so that the ignorance of the master, in the present case, of the wife's paying the additional premium without the authority of her husband, cannot vary the question as to the legality of the transaction. Again, by the 43d section no indenture can be given in evidence by either of the parties, unless such party first makes oath that the sum inserted in the indenture was really all that was paid. In this case the master could not have taken that oath without being guilty of perjury, and the indenture could not have been made evidence on his behalf, which is another criterion to shew that the indenture itself was irregular and void. The argument that the additional sum could not in this case be inserted at the time of executing the indenture, because it was not paid till afterwards, would, if admitted at all, go to defeat the object of the legislature altogether; because upon the same principle the entire premium might be omitted as well as

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a part, and constant frauds would be practised upon the revenue. [*Bayley, J.* But here no fraud was practised upon the revenue, nor could be. The sum *paid* at the time of executing the indenture was 10*l.*, and no more. There was a *promise* on the part of the wife to pay more; but was not that promise void? Could not the husband have recovered back the additional sum paid by the wife, in an action for money had and received against the master? The object of the legislature was to prevent fraud upon the revenue. Here no fraud could be practised upon the revenue, because the stamp upon the indenture was sufficient for any premium under 30*l.*, and therefore much more than sufficient both for the 10*l.* inserted in the indenture, and the two guineas and a half afterwards paid beyond.] It must be admitted that no fraud upon the revenue was actually practised; and if the Court consider the case as depending upon that fact, the argument against the validity of the indenture cannot be carried further.

BAYLEY, J.—It seems to me that the object of the legislature in requiring that the whole sum paid, or agreed to be paid, to the master, should be inserted in the indenture at the time of its execution, was to protect the revenue, which might otherwise be defrauded, by the party's paying at that time a small sum upon which a small duty only would be payable, and afterwards paying a larger sum upon which a larger duty would be payable, and which would thus be lost to the revenue. Nothing that was done in the present case could have any tendency to defeat that object. The sum agreed for and paid by the husband, at the time of executing the indenture, was 10*l.*, and that sum is truly inserted in the indenture. There was an agreement by the wife to pay a further sum, and she did actually pay

a further sum. But neither the agreement nor the payment was binding upon the husband, because both were made without his privity or authority. Then, as I have already observed, there could be no fraud upon the revenue, because both the sums paid amounted to only 12*l.* 12*s.* 6*d.*, and the indenture bore a stamp adequate to any sum under 30*l.* For these reasons I am of opinion that this indenture is a valid instrument, and that a settlement was acquired by due service under it. The order of sessions, therefore, must be quashed.

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The other Judges concurred.

Order of Sessions quashed (a).

(a) *Waddington* was to have argued in support of the indenture.

—◆—

BEECHY v. SIDES.

**TRESPASS**, for an assault and false imprisonment. Plea, not guilty; and issue thereon. At the trial before *Parke, J.* at the spring assizes for the county of Oxford, in 1829, the case was this:—In December, 1828, *Weller* was tenant to the defendant of a farm and two meadows, in one of which there were some willow trees, which *Weller*, in pursuance, as he alleged, of the custom of the country, claimed the right to lop. *Weller* accordingly sold the loppings to *Harris*, who employed the plaintiff to lop the trees. Upon the plaintiff's beginning to lop the trees, the defendant gave him notice to desist, and upon his nevertheless persevering, the defendant, considering the plaintiff as a person committing an offence against the statute 7 & 8 *Geo. 4, c. 30* (b), procured a

The owner of property arresting a person, in the bonâ fide belief that he was acting in pursuance of 7 & 8 *Geo. 4, c. 30, s. 28*, is entitled to the notice of action required by s. 41 of that statute.

(b) Entitled, "An act for consolidating and amending the laws relating to malicious injuries to property."

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constable, who, by the defendant's direction, took the plaintiff into custody. He was taken to the town-clerk's office in Oxford, where he was set at liberty upon his own undertaking to appear the next day before a magistrate. He did so appear, and was then discharged. It was objected on the part of the defendant that the action could not be supported, for want of the notice of action required by the forty-first section of the statute (a), the action being brought against him "for a thing done in pursuance of the act." The learned Judge was inclined to think the objection fatal, but refused to nonsuit the plaintiff, reserving, however, liberty to the defendant to move to enter a nonsuit, if a verdict should be found against him. The jury having found a verdict for the plaintiff, with twenty pounds damages, a rule nisi was obtained for entering a nonsuit upon the objection taken at the trial.

*W. E. Taunton* now shewed cause. The action is maintainable, and the rule must be discharged. The defendant clearly was not entitled to notice as a person

(a) Which enacts, that in "all actions commenced against any person for any thing done in pursuance of this act, notice in writing of such action, and of the cause thereof, shall be given to the defendant, one calendar month at least (*vide* 4 M. & R. 301,) before the commencement of the action."

By s. 20, persons destroying or damaging trees, shrubs, &c. wheresoever growing, and of any value above one shilling, are punishable on summary conviction: by s. 24, persons committing damage to any property, in any case

not previously provided for, may be compelled by a justice of the peace to pay compensation, not exceeding five pounds: and by s. 28, "any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace-officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."



acting in aid of the constable, for he was the principal in the transaction, and the constable merely acted under his directions in arresting the person of the plaintiff: *Staight v. Gee*(a), *M'Cloughan v. Clayton* (b). The only question, therefore, is, whether the defendant, being the owner of the property injured, and having taken the plaintiff into custody, was in that character entitled to notice of action. Now he clearly was not, for his apprehension of the plaintiff was not "a thing done in pursuance of the act;" on the contrary, the defendant was a wrong-doer. The policy of the statute was to protect officers of the law in the execution of their public duties. *Edge v. Parker* (c) is in point. The bankrupt act, 6 Geo. 4, c. 16, s. 44, enacts, that every action brought against any person for any thing done in pursuance of that act, shall be commenced within three calendar months next after the fact committed; and it was decided in that case by this Court, that an entry by assignees into the house of a third person to take the goods of the bankrupt, was not a thing done in pursuance of that act, so as to render it necessary that an action brought against the assignees should be commenced within three calendar months. The Court of Common Pleas had previously come to a similar decision in the case of *Carruthers v. Payne* (d). Upon the principle of these cases the present defendant, who claimed to be the owner of the property injured, and in that character imprisoned the plaintiff, is not entitled to the protection of this statute.

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*Talfourd*, contrà, was stopped by the Court.

(a) 2 Stark. 445.


(b) Holt's N.P.C. 478.

(c) 3 M. & R. 365; 8 B. & C.

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(d) 5 Bingh. 270; 2 Moore &

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LORD TENTERDEN, C. J.—I think this rule for entering a nonsuit must be made absolute. We have nothing to do with the policy of the law; our duty is to give a construction to this clause in this act of parliament consistent with that which has been given to similar clauses in other acts of parliament. It has been uniformly held, that where a party *bonâ fide* believes or supposes that he is acting in pursuance of an act of parliament, he is within the protection of such a clause. The present defendant *bonâ fide*, though erroneously, supposed that he was acting in pursuance of the statute 7 & 8 *Geo.* 4, c. 30, when he caused the plaintiff to be taken into custody. This case, therefore, is perfectly distinguishable from that of *Edge v. Parker*. There was no pretence there for saying that the statute 6 *Geo.* 4, c. 16, gave the assignee of a bankrupt any right to enter the house of a third person for the purpose of seizing the property of the bankrupt. The assignee entered the house as owner of the goods, and not in pursuance of the statute.

BAYLEY, J.—Where the facts are such that a party may be considered as having any fair colour for supposing that he is warranted by the act of parliament in doing that which is made the subject of an action against him, he is entitled to notice. The protection is extended to private persons as well as peace-officers, if they have acted *bonâ fide*.

The other Judges concurred.

Rule absolute (*a*).

(*a*) See *Cooke v. Leonard*, 9 D. & R. 339; 6 B. & C. 351; 4 D. & R. Mag. Cas. 360.

BLACKET v. BLIZARD, Kut., and SAWYER.

1829.

**PROHIBITION.** The libel stated, inter alia, the erection of the district church of St. Matthew, Brixton, under the provisions of 58 *Geo. 3*, c. 45, and 59 *Geo. 3*, c. 134; the assignment to the new church of a portion of the parish of St. Mary, Lambeth, and the appointment of the rector of St. Mary, Lambeth, the curate of the district church, and 26 substantial inhabitants of the said district and their successors, to be a select vestry for the care and management of the concerns of the said church of St. Matthew, Brixton, and all matters and things relating thereto, and in all respects as fully and effectually, and with all such powers and authorities as the commissioners appointed by the said acts, with the advice of the Bishop of Winchester, were authorised and empowered to appoint a select vestry for the care and management of the churches built under the authority of the said acts; and that such select vestry, after being so appointed, had managed, and they and their successors then did manage, the concerns of the said district church and all matters and things relating thereto; that on the 18th April, 1827, at a meeting of a select vestry held in &c. pursuant to notice, the rector of St. Mary, Lambeth, appointed Sir *William Blizard* to be the minister's warden, and the select vestry, then present, elected and chose the defendant *Sawyer* to be the district warden, of the said district church; that the defendants were duly sworn in and continued to be such churchwardens; that certain sums of money being required to defray the necessary expenses relating to the said district church, a meeting of the said select vestry of St. Matthew, Brixton, was on or about the 2d day of August, 1827, held in the vestry room belonging to the said district

To constitute a valid assembly of a select vestry appointed under 58 *Geo. 3*, c. 45, and 59 *Geo. 3*, c. 134, a majority of the whole number appointed should be present.

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church, pursuant to due notice previously given for that purpose; and at such meeting the said select vestry had agreed and resolved, with the concurrence of the churchwardens, that a rate for and towards the repairs of the said district church should be made, and that every inhabitant and occupier of lands, messuages, tenements and premises ratable within the said district should be taxed and pay after the rate of *3d.* in the pound; and that after the said select vestry had so resolved, a rate was accordingly duly made by them, and that on or about the 11th day of the said month of August the said rate was duly allowed and confirmed by the Rev. *William Mann*, clerk, surrogate of the worshipful *John Poulter*, bachelor of law, commissary of the said bishop in and for the parts of Surrey; that the plaintiff was rated or assessed at the sum of *12s. 6d.*, being at the rate of *3d.* in the pound upon a yearly rent or value of *50l.*; that the plaintiff before and at the time of making the said rate or assessment was and still is a parishioner and inhabitant of the said district, and the occupier of a house &c. within the same of the annual value of at least *50l.*, and was by the said rate and assessment duly and justly rated and assessed at the sum of *12s. 6d.*; that the defendants, at the time of making the said rate or assessment, and at the commencement of that suit, were churchwardens for the said district, and that the said sum of *12s. 6d.* so rated &c. was then due to them as such churchwardens; that the plaintiff had been several times requested, and had refused, to pay; that the defendants caused the plaintiff to be summoned before two justices under *53 Geo. 3, c. 127, s. 7, (a)*; that on January 31, 1828,

(a) Which, after reciting that "it is expedient that church or chapel rates of limited amount, unduly refused or withheld, should, in certain cases, be more easily and speedily recovered," enacts, that the same may be so done by summons and warrant by two

the plaintiff appeared before the justices, attended by *R. W.* his attorney, who objected to the validity of the rate of assessment, and delivered to the justices a notice in writing, signed by the plaintiff, stating that he objected to the validity of the same, whereupon the justices declared that they had no further jurisdiction, and that the validity of such rate or assessment must be determined or settled in the Ecclesiastical Court; that no objection was made by the plaintiff or the said *R. W.* to the amount of the said rate or the rent at which the plaintiff was rated or assessed. The declaration then went on to state, that the said rate was made and subscribed at the meeting of the said select vestry, at which meeting a majority of the select vestry-men was not present, but only the churchwardens and five others of the select vestry, and was made for and towards the repairs of the said district church as it was manifestly shewn to the said Ecclesiastical Court, and appears by the rate exhibited to the said Court by the said defendants in support of their said allegation; and although all the before mentioned matters and things manifestly appeared and were proved to the said Ecclesiastical Court, and the said plaintiff thereupon alleged and shewed to the said spiritual judge that the said select vestry had no right by the said acts of parliament, or either of them, or otherwise, to make any such rate for the repairs of the said district

justices with appeal to the sessions, provided that nothing therein contained shall extend to alter or interfere with the jurisdiction of the Ecclesiastical Courts to hear and determine causes touching the validity of the church rate or chapel rate, or from proceeding to enforce the payment of any such rate if exceeding 10*l.*; likewise, that if

the validity of such rate, or the liability of the person be disputed, and notice thereof be given to the justices, they shall forbear judgment, and the persons demanding the same may then proceed to recovery of their demand according to due course of law, as theretofore used and accustomed."

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church; and that the true intent and meaning and interpretation of any act or acts of parliament ought to be tried, discussed and determined at common law in the King's Courts of Record, and not in the Ecclesiastical Court or by any ecclesiastical judge or ecclesiastical jurisdiction whatsoever; that the said rate was not made and subscribed by a sufficient number of the select vestry, and, therefore, prayed the said spiritual judge to reject the said libel, and to dismiss the said suit; nevertheless, the said spiritual judge to reject the said libel or to dismiss the said suit hath wholly refused, but, on the contrary, hath admitted the same, and is daily contriving to condemn the said plaintiff by a definitive sentence or decree of the said Ecclesiastical Court, contrary &c.; and although his majesty's writ of prohibition was on &c. at &c. directed and delivered to the said spiritual judge; and although the defendants then and there had notice thereof, nevertheless the said defendants, after the prohibition &c. General demurrer, and joinder.

*Comyn*, in support of the demurrer. First, a select vestry appointed under 59 *Geo.* 3, c. 134, s. 30, has authority to make a rate for the repairs of the church without consulting the parish at large. Secondly, the rate is good, although a majority of the persons forming the select vestry did not attend. (The Court said that he might confine himself to the second point.) The rule laid down in *Rex v. Bellringer* (a), and *Rex v. Morris* (b), requiring the presence of a majority of each definite integral part, is founded upon the apparent intention; and this case must be governed by the intention of the grantor to be collected from the whole instrument. Here there is nothing to indicate that the legislature required the presence of an absolute majority of the

(a) 4 T. R. 810.

(b) 4 East, 17.

trustees. The nature of the trusts confided in them might render it necessary for them to act at a time when the attendance of an absolute majority of the trustees could not be readily procured. He cited 58 *Geo.* 3, c. 45, s. 60, and 59 *Geo.* 3, c. 154, s. 25, as bearing in support of his argument.

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*Joshua Evans*, contra. In *Grindley v. Barber* (a) and *Cooke v. Loveland* (b), it was held, that the duty imposed upon the body at large is, that a majority of the entire body shall meet. (Here he was stopped by the Court.)

BAYLEY, J.—I take it to be a general rule of law, that where a limited number of persons are to perform a public duty, there must be a majority of the whole body assembled, and that a majority of the persons assembled at such a meeting may act. This was the principle of the decision in *Cooke v. Loveland* (b), which has been cited, and in *Rex v. Bellringer* (c), *Rex v. Miller* (d), and *Rex v. Bower* (e); so also in *Rex v. Beeston* (f), and *Withnell v. Gartham* (g), though the last two are not cases of corporations. So if a commission be issued to twenty justices without a quorum clause, a majority must meet, *Regina v. Ipswich* (h). In the case now before the Court, the act to be done requires the exercise of judgment and discretion, and unless a majority of the entire body were bound to meet, its functions might devolve upon one or two individuals. The public safety requires the security which is afforded

(a) 1 Bos. & Pul. 229.

(b) 2 Bos. & Pul. 31.

(c) 4 T. R. 810.

(d) 6 T. R. 268.

(e) 2 D. & R. 761; 1 B. & C.

492; and see 1 M. & R. 541, n.

(f) 3 T. R. 592.

(g) 6 T. R. 388.

(h) Holt's Rep. 443, S. C. not S. P. 2 Ld. Raym. 1233, 1283;

2 Salk. 434; 11 Mod. 67.

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by the presence of a majority of the persons constituting the select body. The 60th section of 58 *Geo. 3*, c. 45, and the 25th section of 59 *Geo. 3*, c. 134, have been cited, but I think that they do not control or alter the general law. Upon the whole, I think that the rate is invalid by reason of its having been made by a smaller number than the majority, namely, by seven, when the body consisted of twenty-six.

LITTLEDALE, J.—I am of the same opinion. The distinction is between an indefinite and a definite body. In the case of a select vestry, which is a definite body clothed with a special public trust, I think it most important that a majority of the persons in whom such trust is reposed should attend. The object of the legislature is that a certain number of the inhabitants should assemble to give their judgment and use their discretion in making the rate.

PARKE, J.—I am of the same opinion. I can see no difference between the rule of construction as to a charter and as to an act of parliament; and it having been a rule in cases of construction of charters that a majority of a definite body must assemble, I do not think that the clause in the acts referred to on the part of the plaintiff affects the general rule. If that rule were not to apply to this body, it might be permitted to die away, or to be reduced to a very small number.

Judgment for the plaintiff.





The KING v. The Commissioners of the NENE  
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1829.

**THIS** was a rule obtained at the instance of the Reverend *Thomas Leigh Bennett*, clerk, whereby the commissioners for putting in execution an act of parliament made and passed in the seventh and eighth years of the reign of his present majesty, "for improving the outfall of the River Nene and the drainage of the lands discharging their waters into the Wisbech River, and the navigation of the said Wisbech River from the upper end of Kinderley's Cut to the sea, and for embanking the salt marshes and bare sands lying between the said cut and the sea," were called on to shew cause why a writ of mandamus should not issue, directed to them, commanding them to issue their warrant or precept under their common seal to the sheriff of the county of Lincoln, commanding him to impanel, summon, and return a jury, in pursuance of the directions of the said act, to appear at the next general quarter sessions of the peace to be holden in and for the parts of Holland, in the said county, to inquire of, assess, and award and give a verdict for the sum or sums of money to be paid by the said commissioners to the said *Thomas Leigh Bennett* as a satisfaction or compensation for the damage done in the execution of the said act to the rectory and vicarage of Long Sutton, in the said county, or the tithes thereof. Upon shewing cause against the rule so obtained, the Court ordered it to be enlarged, and directed that in the meantime the facts upon which it was to be argued should be stated for their opinion in the following case:

By the act of parliament referred to in the rule, certain commissioners for executing the act were incorporated under the name and style of "The Commissioners of the Nene Outfall," and provision was made for the

Under a clause in an act giving compensation for the value of lands, tenements, and hereditaments, or for damage done thereto, the tithe owner is not entitled to compensation for the injury done to him by the conversion of tithable land taken for the purpose of the navigation, and covered with water.

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appointment of a committee of the commissioners for executing the act. By the 34th section of this act it is enacted, " that if and when any lands, sands, tenements, buildings, or hereditaments, shall be wanted for any of the purposes of this act, it shall and may be lawful for all bodies politic, corporate or collegiate, corporations aggregate or sole, tenants for life or in tail, husbands, guardians, trustees, feoffees in trust, committees, executors and administrators, and all other trustees and persons whatsoever, and for every or any of them, not only for or on behalf of themselves respectively, and their respective heirs and successors, but also for and on behalf of their respective cettux que trust, whether infants, issue unborn, lunatics, idiots, femes covert, or other persons whatsoever under any legal disability, and for all femes covert who shall be seised, possessed, or interested in their own right, and for all other persons whatsoever who shall be seised, possessed, or interested of or in any lands, sands, tenements, buildings or other hereditaments, which shall be wanted for any of the purposes aforesaid, and for every or any of them, to contract for and sell the same lands, sands, tenements, buildings or other hereditaments, and every or any part thereof, and by indentures of lease and release, or by indenture of bargain and sale inrolled, to convey and assure the same unto the said commissioners for executing this act, and their successors and assignis, absolutely and in fee simple; and that all such contracts, sales, conveyances, and assurances shall be valid and effectual in law to all intents and purposes whatsoever." By the 35th section of the said act it is enacted, " that all bodies corporate or collegiate, corporations aggregate or sole, trustees, or other persons hereinbefore capacitated or authorised to sell and convey any lands, sands, tenements, buildings or other hereditaments, and all other

owners of the same, and all occupiers of any such lands, sands, tenements, buildings or other hereditaments, or any of them, shall and may accept and receive such compensation or satisfaction for the value of such lands, sands, tenements, buildings and other hereditaments, or for any damage that shall be done thereto in the execution of any of the works by this act authorised to be made or done, as shall be agreed upon by and between the said owners and occupiers respectively for the time being, or other parties interested, or any of them, and the said commissioners for executing this act, or their committee hereinbefore appointed; and the said commissioners, by themselves or their said committee, may and shall be at liberty to enter upon, and thenceforth for ever to have, take, and enjoy the said lands, sands, tenements, buildings and other hereditaments, for the purposes of the said act; and in case the said commissioners or their said committee, and the said owners, occupiers, or parties interested in such lands, sands, tenements, buildings or other hereditaments, cannot or do not agree as to the amount or value of such compensation or satisfaction, such amount or value shall be ascertained and settled by a verdict of a jury, as is hereinafter directed." By the 36th section of the said act it is enacted, " For settling all differences that may arise between the said commissioners for executing this act, or their said committee, and the several persons interested in any lands, sands, tenements, buildings or other *hereditaments* which shall or may be taken, used, *affected or prejudiced* for any of the purposes of this act, or by reason of the execution of any of the powers hereby granted, that if any body corporate or collegiate, or any person or persons so interested as aforesaid for or on his, her, or their part or parts, or for or on the part of his, her, or their *cetteux que trust*, or for or on the part

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of any other incapacitated person or persons as aforesaid, shall refuse to accept such compensation or satisfaction as shall be offered to them, him, or her, by the said commissioners for executing this act, or their said committee, or by any person on their behalf, and shall give notice thereof in writing to the said commissioners or their said committee, or to their clerk, within seven days next after such offer shall have been made; and the party or parties giving such notice as aforesaid shall therein request that the amount of such compensation or satisfaction, or any matter in difference touching the same, may be submitted to the determination of a jury; or if any body politic, corporate, or collegiate, or any person or persons seised, possessed, or interested, either for themselves respectively or for any other person or persons, of or in any such lands, sands, tenements, buildings or other hereditaments as aforesaid, shall refuse to treat, or shall not agree with the said commissioners for executing the said act or their said committee, or with any person or persons authorised to act on behalf of the said commissioners, for the sale and conveyance of their respective estates and interest therein, or cannot be found or known, or shall not produce and evince a clear title to the hereditaments or premises in question, or to the estate or interest which they shall respectively claim therein, to the satisfaction of the said commissioners or their said committee, or of the person or persons authorised to act on behalf of the said commissioners, then and in every such case it shall be lawful for the said commissioners or their said committee from time to time to issue a warrant or precept, under the common seal of the said commissioners, to the sheriff or chief bailiff of the county, parts, or isle in which such lands, sands, tenements, buildings or other hereditaments shall lie, or the matter in question or dis-

pute shall arise; or in case such sheriff or chief bailiff, or his under-sheriff or deputy bailiff, shall be immediately interested in the matter in question, then to one of the coroners of the said county, parts, or isle, not being so interested as aforesaid, commanding such sheriff, chief bailiff, or coroner, who is hereby required, on receiving such warrant or precept, to impanel, summon, and return not less than 24, nor more than 48, substantial and indifferent persons qualified to serve on juries within his jurisdiction; and the persons so to be impanelled, summoned, and returned as aforesaid, are hereby required to appear before the justices of the peace of the county, parts, or isle from which they shall be impanelled and summoned, at some Court of general or quarter sessions of the peace to be holden in and for such county, parts, or isle, as the case may be, or at some adjournment thereof, as in such warrant or precept shall be directed, and to attend such Court from day to day until discharged by the said Court; and out of such persons so to be impanelled, summoned, and returned as aforesaid, a jury of twelve men shall be drawn by the clerk of the Court or his deputy, in such manner as juries for trials of issues joined in his majesty's Courts of law at Westminster are by law directed to be drawn; and in case a sufficient number of the said persons so impanelled, summoned, and returned as aforesaid, shall not appear at the time and place appointed as aforesaid, the said clerk shall return other honest and indifferent men of the bye-standers or of others who can be speedily procured to attend that service, being so qualified as aforesaid, to make up the said jury to the number of twelve, and that all parties concerned shall and may have their lawful challenges against any of the said jurymen, but shall not challenge the array; and the said clerk is hereby required, upon the application of any of the said

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parties interested in the matter in question, to summon before the said justices any witnesses touching the said matter, and may authorise the said jury, or any three or more of them, to view the place or places or matter or matters in question, and such jury shall upon their oaths (which oaths as well as the oaths of such witnesses the said justices are hereby empowered to administer) inquire of, assess, and award and give a verdict for, the sum or sums of money to be paid by the said commissioners to the respective bodies, persons, or parties interested, as a compensation or satisfaction for the purchase of such lands, sands, tenements, buildings or other hereditaments respectively, or for any damage which shall have been done thereto or to the parties interested therein respectively; and the said justices shall give judgment for such sum or sums of money for which such verdict of the said jury shall have been so given as aforesaid; and the said verdict and the judgment thereupon shall be binding and conclusive to all intents and purposes upon all bodies politic, corporate, or collegiate, and upon all persons and parties whatsoever interested therein, provided that 14 days' notice in writing, at the least, of the time and place when and where such jury shall be so summoned to attend shall have been given to the bodies politic, corporate, or collegiate, or to the persons interested or claiming so to be, before the time of the meeting of the said justices and jury as aforesaid, by leaving such notices at the dwelling-house of such persons respectively, or of the head officer of such bodies politic, corporate, or collegiate respectively, or with some tenant or occupier of the premises respectively in respect of which such compensation or satisfaction shall be intended to be assessed as aforesaid." By the 37th section of the same act it is enacted, "that the several verdicts which the said respective juries shall

respectively give in the execution of the powers hereby vested in them concerning the compensation or satisfaction to be made for the value of any lands, sands, tenements, buildings or other hereditaments, and for any injury or damage sustained or to be sustained as aforesaid, shall be distinct, and the said respective juries shall therein and thereby distinguish the sum or sums of money to be paid for the value of any such lands, sands, tenements, buildings or other hereditaments, from the sum or sums of money to be paid for any such injury or damage as aforesaid, separately and apart from each other, and also shall settle what shares and proportions of such several sums of money shall be allowed and paid to any tenant or tenants or other person or persons having a partial estate, term, or interest in the premises, for his, her, or their interest or respective interests therein." By the 39th section of the said act it is enacted, "that the said commissioners for executing this act, or their said committee, shall not, nor shall any jury to be summoned by virtue of this act, be allowed to receive or take notice of any complaint or complaints to be made by any body or bodies or person or persons whatsoever, for any injury or damage by him, her, or them really sustained or supposed to be sustained in consequence of this act, or of any thing done by virtue hereof, unless notice in writing, stating the particulars of such injury or damage, and the amount of the compensation or satisfaction claimed in respect thereof, shall have been given by or on behalf of such body or bodies or person or persons to the said commissioners for executing this act, or their said committee, or to the clerk of the said commissioners, within the space of two calendar months next after the time that any such real or supposed injury or damage shall have been sustained or supposed to have been sustained, or the doing or com-

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mitting thereof shall have ceased." By the 41st section of the same act it is further enacted, " that all and every bodies or body, persons or person, requiring a jury to be summoned for any of the purposes hereinbefore mentioned, shall, before a warrant or precept shall be issued for summoning such jury, enter into a bond, with two sufficient sureties, to the said commissioners for executing this act, in a penalty of 500*l.*, with a condition to pay all such costs and expenses, or proportionate part of such costs or expenses, of impannelling, summoning, and returning such jury, and taking such verdict and obtaining such judgment as aforesaid, as they, he, or she shall be liable to pay according to the provisions and the true intent and meaning of this act." By the 54th section of the act it is enacted, " that upon payment or legal tender of such sum or sums of money as shall have been contracted or agreed for between the parties, or determined and adjusted by any jury in manner aforesaid, for the purchase of any such lands, sands, tenements, buildings or other hereditaments, or as a compensation for damages, as hereinbefore mentioned, to the proprietor or proprietors of such lands and premises respectively, or such other person or persons as shall be interested therein, or entitled to receive such money or compensation respectively, within one calendar month next after the same shall have been so agreed for, determined, or awarded, as aforesaid, or if the person or persons so interested or entitled, or any of them, cannot be found, or shall refuse to receive the same, or shall not be able to make a good title to the premises for which the same shall be due, to the satisfaction of the said commissioners for executing this act, or of their said committee, or shall refuse or neglect to execute a conveyance or conveyances of the said premises, then upon payment or investment of such sum or sums of money into or in the Bank of



England, or in such other manner as is herein directed or authorised, it shall and may be lawful for the said commissioners or their committee, and their officers, agents, servants, and workmen, immediately to enter upon such lands, sands, tenements, buildings or other hereditaments respectively, and then and thereupon the same lands, sands, tenements, buildings and other hereditaments, and the fee simple and inheritance thereof, together with the yearly profits thereof, and all the estate, use, trust, and interest of any person or persons therein, shall from thenceforth be vested in and become the sole property of the said commissioners for executing this act, to and for the purposes of this act for ever; and such tender, payment, or investment shall not only bar all right, title, claim, interest and demand of the person or persons entitled to or interested in such sum or sums of money, but also shall extend to and shall be deemed or construed to bar the dower of the wife of every such person, and all estates tail and other estates in reversion and remainder, of his, her, or their issue, and of every other person whatsoever, and all other estates, rights, titles, and interests, in possession, reversion, remainder and expectancy, of all and every persons and person whomsoever, of and in the said premises. Provided nevertheless, that before such payment, tender, or investment as aforesaid, it shall not be lawful for the said commissioners for executing this act, or their said committee, or for any person or persons acting under their authority, to take or use any such lands, sands, tenements, buildings or other hereditaments as aforesaid, for the purposes of this act, without the consent of the respective owners and occupiers thereof." By section 56 provision is made for the deposit of the map or plan of the intended new cut or channel, and the lands through which the same was intended to be carried, and also

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schedules of references, in certain offices, to be open to the inspection of all persons on payment of certain fees. By section 57 the commissioners are authorised and required to set out and make the proposed new cut or channel, and all necessary drains, sluices and tunnels; and by section 58 the direction and dimensions of the cut are ascertained and directed to be in conformity with the map or plan. By the 59th section of the act it is enacted, " that it shall and may be lawful for the said commissioners for executing this act, and for their said committee hereinbefore appointed, and they are hereby severally fully authorised and empowered to take, retain, and make use of any lands, sands, tenements, buildings or other hereditaments, which according to the said map or plan and schedule shall appear to be required for the site of the said intended new cut or channel, and the banks, forelands, and fences thereof, not exceeding 250 yards in breadth, or which shall be or be situate within 100 yards of the back of the bank, or either side of the respective boundary lines of the said intended new cut or channel, they, the said commissioners, making satisfaction or compensation for such lands, sands, tenements, buildings or other hereditaments which shall be so taken or made use of as aforesaid in the manner hereinbefore directed in that behalf; but that the said commissioners or their said committee shall not take or make use of any lands, sands, tenements, buildings or other hereditaments, for the site of the said intended new cut or channel or of any of the banks, forelands or fences thereof, except such as are in this act respectively expressed and authorised to be taken or made use of, unless the consent in writing of the owner or owners for the time being of the lands, sands, tenements, buildings or other hereditaments which shall be so taken or made use of as aforesaid, except as aforesaid, shall have been previously

given, such owner or owners being at the time of giving such consent seised of or entitled to such lands, sands, tenements, buildings or other hereditaments for one or more life or lives, or for years determinable on some life or lives, or for some estate of freehold or inheritance therein, or unless it shall appear to any two or more justices of the peace acting for the said Isle of Ely, or for the said county of Norfolk, or for the said parts of Holland, in the said county of Lincoln, wherein the said lands, sands, tenements, buildings or other hereditaments shall lie or be situate as the case may be, and shall be by them certified in writing that the omission thereof in the said map or plan or schedules, as the case shall be, proceeded from error or mistake." The *Rev. Thomas Leigh Bennett*, at whose instance this rule was obtained, was at the time of passing the act, and still is, lay impropriator of the parish of Long Sutton, in the county of Lincoln, and also vicar of the same parish, and as such lay impropriator and vicar entitled to the great or rectorial tithes, and also to the small or vicarial tithes of the same parish, according to the map or plan and schedules of reference alluded to in the act as ascertaining the course of the proposed new cut or channel; that new cut or channel will pass through the tithable lands of the rectory and vicarage of Long Sutton, which have hitherto produced corn or grass, and from whence *Mr. Bennett* and his predecessors have been accustomed to take and receive great and small tithes. According to that plan upwards of 200 acres of such tithable lands will be taken for the purposes of the commissioners and cut away for the making of the proposed new cut, and the surface destroyed and rendered incapable of bearing corn and grass. Before the application for this rule, the commissioners, by their workmen, commenced the cutting away of the tithable lands aforesaid in the direction of

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the proposed cut and according to the map or plan; and Mr. *Bennett*, at the request of the parties to whom the tithes were leased, made a reduction of 5s. per acre in the rent at which they were then demised throughout the parish; upon this, Mr. *Bennett* made to the commissioners a proposal for a certain amount of compensation to be made to him in respect of the premises, which was declined by the commissioners on the ground that he had an interest only in the produce of the soil and not in the soil itself, and that they were, therefore, not liable to make any compensation for the loss of tithes. Mr. *Bennett* has within the proper time required the commissioners to summon a jury under the 36th section of the act to inquire of, assess, award, and give a verdict for a sum of money to be paid by them to him as a compensation or satisfaction for the damage which he will sustain by reason of the premises, and has complied with the other requisitions of the act preparatory to such proceeding. The commissioners and their committee have refused to summon such jury upon the ground that Mr. *Bennett* is not a party entitled to any compensation within the meaning of the statute. Upon this refusal the present rule was obtained.

The question for the opinion of the Court is, whether Mr. *Bennett*, as lay impropriator and vicar of the parish of Long Sutton, is, under the act above cited, 7 & 8 Geo. 4, c. 85, entitled to compensation in respect of the tithable lands of the parish being taken and cut away for the purposes of the act and the damage he will sustain as such lay impropriator and vicar, or in either character, thereby. If the Court shall be of opinion in the affirmative, a peremptory mandamus is to issue; if in the negative, the present rule is to be discharged.

The act of 7 & 8 Geo. 4, c. 85, is to be taken as part of this case; and either party is to be at liberty, on the argument, to refer to any of its clauses.

*Talfourd*, for the prosecution. Mr. *Bennett* is to be compensated on two grounds. First, he is entitled to compensation by the express words of the act of parliament under which the commissioners derive their authority, on the ground that the word "hereditaments" includes tithes. Secondly, he is entitled to compensation on the ground of damage done to the rectory. The term "hereditaments" may be limited by the context; but here it must be taken to include incorporeal hereditaments (a). [*Bayley*, J. The act contains no clause which compels the commissioners to buy what they do not want for the purposes of the act. You must shew a right to the tithes *before* they arise.] Mr. *Bennett* has an estate in the tithes before they arise. [*Bayley*, J. The lands would not lose their tithable quality by being appropriated to the purposes of the act.] To constitute an hereditament it is only necessary that there be a descendible estate. Here there is a descendible estate, and that estate is destroyed. [*Bayley*, J. The act of which you complain prevents the tithes from arising. Can you be said to have any interest in land because if it be used in a certain way a benefit will arise to you?] It was said by Lord *Tenterden* in a late case (b) that statutes must be construed by looking not at the preamble or at the words of one particular clause alone, but at the language of the whole, and if in the preamble

(a) "But hereditamentum, hereditament, is the largest word of all in that kind, for whatsoever may be inherited is an hereditament, be it corporeal or incorporeal, real or personal or mixed." Co. Litt. 6 a. And see *Quare* impedit, *Dyer*, 323 b. pl. 30; *West Bodwin* case, *ibid.* 350 b. 351 a; Lord *Arundel* v. *Venn*, 2 Roll. Abr. 186; *The*

*Marquess of Winchester's* case, 3 Co. Rep. 2 b.; *Nevill's* case, 7 Co. Rep. 34 b.; 3 Inst. 19; *Wimbish* v. *Talbois*, Plowd. 58; *Robert's* case, F. Moore, 176, pl. 310; *Gully* v. *Bishop of Exeter*, 4 Bingh. 290; 3 Com. Dig. Grant, E. 1.

(b) *Doe* v. *Brandling*, 1 M. & R. 605.

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or any one clause there are found expressions less large and extensive than in other parts, and upon a view of the whole it appears that the larger and more extensive expressions used in other parts best shew what the intention of the legislature was, then it is a duty to give effect to the larger expressions, notwithstanding the more limited phrases which may be found in other places. The Court must look at the whole act, and form their judgment upon it as a whole. [*Bayley, J.* We are bound to construe a statute of this nature as if it were a private conveyance from *A.* to *B.* Questions of this kind must constantly arise upon canal acts.] Parties are entitled to compensation for rights of common, and the commoner would become entitled under the term hereditament. So of rights of way. [*Parke, J.* The parties entitled to compensation are persons who would have had a right of action if the acts in respect of which they claim compensation had been done without the authority of the legislature. All these acts of parliament are in the nature of private agreements. Lord *Manfield* says, "The legislature only lends its aid to the agreement of the parties." A rector would have no right of action if pasture were turned into arable, although such alteration might seriously lessen the amount of his tithes. *Bayley, J.* Could Mr. *Bennett* have brought an action against the proprietors of these lands for selling them to the commissioners for a purpose not producing tithes, or in order to be thrown into the sea? Suppose it were stated in a declaration by the rector that the defendant wrongfully sold land to be applied to a purpose from which no tithes could arise, could such a declaration be supported? Legal injuries only are to be compensated. You may remember a case in which the lord of the manor, being on bad terms with the rector, suffered all the lands in the parish to lie waste.] Supposing the

whole parish to be taken away, it could not be contended that the rector had sustained no damage. The question is whether by the term "party interested," the Court is bound down to the strict meaning of the phrase "legal interest."

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*T. Clarkson*, contra, was stopped by the Court.

BAYLEY, J.—It appears to me that this act is to be construed, as all other private acts ought to be, as if it were a private agreement. The parties who are to agree are persons who shall be seised, possessed or interested of or in any lands, tenements, buildings, or hereditaments which shall be wanted for any of the purposes aforesaid. This clause must apply where there is a legal interest, which the parties are by the act enabled to part with, and it applies to those persons only who are seised, possessed, or interested. I cannot say that the lay impropriator or the vicar is interested in the land. If it be contended that the right exists, it will be proper to see whether there is any remedy for the invasion of the right. It has been put what the case would be if the whole parish were so dealt with; that is an argument to be addressed to the legislature, not to a court of law.

LITTLEDALE, J.—I do not remember a single instance in which a rector has claimed to be entitled to compensation for loss of tithe occasioned by land being applied to a purpose which rendered it incapable of producing tithe. I never heard of such a clause in any act of parliament; and without such a clause the rector would certainly not be so entitled. Tithes are not a species of hereditament contemplated by the act; the tithe owner has no right to tithes until they are absolutely renewed.

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Then the compensation for damage spoken of in the act, must mean a legal damage, such a damage as *Mr. Bennett* might have brought an action for, if it had been occasioned by the proprietor, without the intervention of an act. The tithe owner may be said to sustain damage by reason of the land not being cultivated; but that is not such a damage as the law recognises. If a clause had been introduced into the act for the benefit of the rector, it would probably have been to give him some part of the compensation assessed in respect of the land; in this act the whole compensation is given to the landowner.

PARKE, J.—I am of the same opinion. The application is resisted on two grounds. First, that it was the land in question that was wanted for the purposes of the act, tithes not being wanted by the commissioners. Secondly, that the parties are not strictly interested. This is an act enabling persons to sell, and compelling them to submit to the verdict of a jury in case they cannot agree with the commissioners. It is said that a different construction must be put upon this clause, from the supposed intention of the legislature. I do not think that any such intention appears. The object of the act was to enable and compel parties to sell. After a sale for these purposes, no claim for damages can be supported. No person who consented to the appropriation of his land for this purpose would be liable to an action for so doing. The meaning of the clause was not to arm the commissioners with power to do that which they could not have done without. A right of way or common would entitle the owner to compensation; the rector or vicar is not so entitled. There is no reason for putting a different construction upon the word interest in this statute from that which it would



bear in other cases. I do not, therefore, think Mr. *Bennett* entitled to the compensation claimed. If the proprietors of lands had made the cut without the intervention of the act, no legal injury would have accrued to Mr. *Bennett*; he could not have maintained any action against them. I do not think Mr. *Bennett* entitled to any compensation either for lands taken for the purpose of the act, or for any damage done to lands by the execution of the works.

Rule discharged.

The KING v. DAY.

THIS was a rule calling upon the defendant to shew cause why an information in the nature of quo warranto should not be filed against him for usurping the office of alderman of Norwich. The ground of the motion was, that the defendant, being an alderman of Norwich, and, as such, a justice of the peace for that city, had accepted an incompatible office, namely, that of inspector of corn returns. The decision of the Court proceeded upon the question of the sufficiency of the affidavit upon which the rule was obtained, and which stated as follows:—  
“That the defendant being one of the aldermen of the city and county of the city of Norwich, and a justice of the peace for the said city and county, was in the month of April last appointed inspector of corn returns in and for the said city and county as deponent believes, he, deponent, having seen in the books kept by the clerk of the peace of and for the said city and county, in which are recorded the proceedings of the justices of the peace of the said city and county, an entry of the appointment of the said defendant at a meeting of the said justices, holden on the 28th of April, which deponent believes to

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On a motion for a quo warranto information against a corporator, on the ground of the acceptance of an incompatible office, the relator must shew a *legal* appointment to the second office.

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be a true entry of such appointment ; that the defendant accepted the said office, and has ever since acted in, and still is acting in and executing, the office of inspector of corn returns of and for the said city and county, as deponent has been informed and verily believes."

*Alderson* and *Patteson* shewed cause. This rule must be discharged. Assuming for the present that the offices of inspector of corn returns and of alderman are so incompatible, that the acceptance of the former, not being a corporate office, will vacate the latter, it ought at least distinctly to appear that the defendant has been legally appointed to the office of inspector of corn returns. That does not appear upon the affidavit upon which this rule was obtained. The appointment to this office is regulated by the statute 9 *Geo.* 4, c. 60, s. 20 of which provides, that in every city being a county of itself, the mayor and justices of the peace assembled at the general quarter sessions of such city, or some adjournment thereof, shall have the same powers given by the preceding clause to justices of the peace for counties; one of which is the appointment of inspectors of corn returns. The relator, therefore, ought to have shewn by his affidavit that the defendant was appointed by the mayor and justices of the peace of Norwich assembled at a general or adjourned quarter sessions. It is not sufficient, in any case of this kind, to shew that the defendant has exercised the office, the acceptance of which is urged as the ground for removing him from a corporate office, much less is it sufficient in the present case. In *Rex v. Slythe* (a), where it was held that the affidavit of a relator in a motion for a quo warranto, that he had been informed and believed that the defendant exercised the office which he was charged with usurping, was suf-

(a) 9 D. & R. 226; 6 B. & C. 245.

ficient, the affidavit applied to the office from which it was sought to remove the defendant; here it applies to the office, the acceptance of which is urged as the ground of removing the defendant from his corporate office: a circumstance which effectually distinguishes that case from the present.

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*Scarlett, A. G. and Campbell, contra.* The affidavit is sufficient, being uncontradicted. It states the information and belief of the deponent that the defendant executed the office, which it has for many years been the practice of the Court to admit as sufficient, if uncontradicted. *Rex v. Slythe (a).*

LORD TENTERDEN, C. J.—I think this rule ought to be discharged, and that we may discharge it without at all breaking in upon what has been truly stated as the practice of the Court in former cases. The affidavit states the information and belief of the deponent that the defendant has executed the office of inspector of corn returns for the city of Norwich. But his merely executing that office, unless he has been legally appointed to it, will not vacate his office of alderman. Those who seek to remove a man from one office, by shewing that he fills another which is incompatible with that one, must shew clearly that he legally fills the office which is said to be incompatible, and the acceptance of which is supposed to vacate the former. Here the affidavit shews no such thing. It states, indeed, that the defendant had been appointed inspector of corn returns, as the deponent believed, assigning as the ground of his belief that the deponent had seen an entry of such appointment in the

(a) 9 D. & R. 226; 6 B. & C. 245. And see *Rex v. Harwood*, 2 East, 177, upon the authority of which this point was decided in *Rex v. Slythe*.

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books kept by the clerk of the peace, by which it appeared that the appointment was made at a meeting of justices. Now if the affidavit had stated in the most unequivocal terms that the defendant had been appointed at a meeting of justices, that would not have sufficed to shew a legal appointment, because the legislature have thought proper to require that the appointment shall be made by the mayor and justices assembled at quarter sessions. Unless the defendant was appointed by the mayor and justices assembled at quarter sessions, he never filled the office of inspector of corn returns, and consequently, cannot, by reason of his acceptance of that office, have vacated that of alderman. For these reasons it seems to me that this rule must be discharged; but I think it should be without costs.

The other Judges concurred.

Rule discharged, without costs.

The KING v. The Inhabitants of YARWELL.

Relief given by one parish to a pauper residing in another, is *prima facie* evidence of his being settled in the relieving parish; but though the sessions may properly act upon such evidence, they are not bound to do so.

TWO justices, by their order, removed *Thomas Ireson*, his wife, and their children, from the parish of Yarwell, in the county of Northampton, to the parish of Stibington, in the county of Huntingdon; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

The respondents proved, by the pauper and his wife, that the appellants had, about twenty-eight or twenty-nine years ago, and at three or four times subsequently, the last being ten years ago, relieved the pauper and his family while they were residing in the respondent parish. When they wanted relief, they applied to the

parish officers of the appellant parish for work, and as they could not find it for them, they allowed the family twelve shillings a week. It was the pauper's wife who applied for relief upon all those occasions except one, when the application was made by the pauper himself. He had been once examined by the appellants, and stated that he had been an apprentice in their parish. The appellants also, within the last six years, and while the pauper was resident in the respondent parish, paid the expenses of his wife's confinement in a lunatic asylum at Peterborough.

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*Campbell and Miller*, in support of the order of sessions. Upon this evidence the sessions would have been warranted in inferring a settlement in the appellant parish, but they were not bound to do so. Relief is only evidence of the opinion of the parish officers that the pauper is settled in the relieving parish. That opinion may prove erroneous, and if so, they are not concluded by acts done under its influence. The respondents might have proved the fact of a settlement acquired in the appellant parish, instead of which they chose to rest their case upon presumptive evidence only. That evidence did not convince the sessions, and they were at liberty to reject the presumption suggested to them. The leading cases upon this subject are, *Rex v. Stanley-cum-Wrenthorpe (a)*, and *Rex v. Edwinstowe (b)*, but they only shew that the sessions *may* infer a settlement from evidence of relief, not that they are bound to do so.

*Humfrey*, *contrà*. The sessions were clearly wrong. There were *no* premises to warrant the conclusion which they drew. The only rational conclusion resulting

(a) 15 East, 350.

(b) 8 B. & C. 671.

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from the evidence was, that the pauper was settled in the parish of Yarwell. Such evidence, unexplained, has always been deemed sufficient, at least as a *primâ facie* case, throwing the onus upon the opposite party. He cited *Rex v. Wakefield* (a).

BAYLEY, J.—The sessions have sent a case for our consideration, but they have not thought proper to state what question they wished us to answer. They have stated a strong *primâ facie* case, from which they were certainly free to draw the conclusion that the pauper was settled in the parish of Stibbington; but they were as certainly not bound to do so. It was a question simply and purely for them. The pauper was examined as a witness, and he might have been interrogated upon the fact whether he had ever gained a settlement in the appellant parish, by apprenticeship or otherwise, or whether there were reasonable grounds for concluding that he had done so. Finding that he was not so interrogated, the sessions may have thought it improper to act on mere presumptive evidence of a settlement, when the respondents might have proved the fact of a settlement acquired in the appellant parish. At any rate it was a question for them, and we are not at liberty to disturb their finding.

LITTLEDALE, J.—I am entirely of the same opinion.

PARKE, J.—If the sessions had asked us whether there was *primâ facie* evidence of a settlement in the appellant parish, I, for one, should have answered that there was, and that they might properly have acted upon it. If they had asked whether they were bound to do so, I should have answered that they were not.

Order of Sessions confirmed.

(a) 5 East, 335; 1 Smith, 512.

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## The KING v. The Inhabitants of ST. JOHN, DEVIZES.

ON appeal against an order for the removal of *Prudence Abrahams* from Chippenham to Devizes, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, being at the time settled in St. John, Devizes, on the 6th February, 1826, was hired by the foreman of a Mr. *Spiers*, under the following agreement, which was signed by the parties named in it:—

“*Prudence Abrahams*, of Brumham, in the county of Wilts, silk winder or weaver, with the consent and approbation of her father *Robert Abrahams*, hereby hires herself to Mr. *Spiers*, of Chippenham, to work in his factory as silk winder or weaver, for four years from this day. Mr. *Spiers* agrees to pay for the services of the said *Prudence Abrahams*, for the first year three shillings a week, for the second year four shillings a week, for the third year five shillings a week, and for the fourth year six shillings a week, subject to a proportionate reduction being made for loss of time occasioned by sickness, or her being otherwise absent from work. And it is hereby agreed that the said *Prudence Abrahams* shall in all things observe and obey all the rules and regulations of the said Mr. *Spiers*, as well with regard to the hours of attendance and of work, as the mode and other particulars of working; and shall in all things whatsoever conduct herself faithfully, honestly, and diligently in her said engagement, and as a good servant ought to do. It is also agreed that in case the said *Prudence Abrahams* shall unnecessarily waste, or otherwise lose, destroy, or make away with the silk entrusted to her, she shall pay such reasonable compensation to Mr. *Spiers* as his superintendent shall appoint. If at

A pauper hired herself under a written agreement to work in a factory for four years at weekly wages, and “to observe all the rules with regard to the hours of attendance and of work.”

The rules were not reduced into writing, and were occasionally varied by the master, but the pauper was told that she must work twelve hours a day:—Held, first, that this was not an exceptive hiring, and that due service under it conferred a settlement; and secondly, that the parol communication made to the pauper was not admissible evidence to explain the written agreement.

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the expiration of the above period the said *Prudence Abrahams* shall have behaved well, shall have done her work well, and shall in every respect have duly performed this engagement, but not otherwise, Mr. *Spiers* promises to give the said *Prudence Abrahams* the sum of 3*l.* as a gratuity and reward for her good conduct, over and above the weekly wages above specified, subject nevertheless to any deduction which may have accrued in respect of absence by reason of sickness, or otherwise above mentioned."

When the pauper executed the agreement the foreman told her that she must observe the working hours, and if certain work was not done, must work twelve hours a day. The pauper entered on her service the day she executed the agreement. Rules for the factory had not at that time been reduced to writing. The foreman said they existed only in the breast of the master, but were known to and acted on by the work people. They were during the service of the pauper occasionally altered in some respects by the master alone; but the foreman stated that the rule as to the hours of work was never changed. Time, however, was at first allowed for tea, which allowance was afterwards revoked by the master's sole authority. Under this hiring the pauper served a year in Chippenham, and becoming afterwards chargeable, was removed to St. John, Devizes, which removal was the subject of appeal. The questions were, whether this was an exceptive hiring, and whether the parol evidence was properly received.

*Bingham* and *Follett*, in support of the order of sessions. This was an exceptive hiring; therefore the sessions were right in holding that no settlement was acquired by service under it. If an intention to except



be apparent upon the face of the contract, that constitutes an exceptive hiring: *Rex v. North Nibley*(a). The stipulation that the servant should observe the rules of the factory with regard to the hours of work and attendance, shews clearly that she was not to be under the master's control at all hours, because otherwise such a stipulation was wholly unnecessary. A stipulation for "hours of attendance" on one side, necessarily involves a right to hours of non-attendance on the other, and is never found in hirings of domestic or agricultural servants, who are always hired by the year, the quarter, the month, or the week, without any reference at all to hours. If the pauper observed the rules as to hours of attendance, the master could have no right to her service during the hours of non-attendance. *Rex v. Byker* (b), where the hiring was held not to be exceptive, is a very different case from this, because there the number of hours was introduced into the agreement merely as a mode of calculating the amount of wages. Secondly, the parol evidence was properly received. The agreement referred to certain rules and regulations as part of the contract; they were not reduced into writing: they could, therefore, be ascertained only by parol testimony. Parol evidence may be received to explain a written instrument, *Rex v. Laindon* (c), where the question being whether a written contract to learn a trade was a contract of hiring and service or of apprenticeship, parol evidence that the person who was to learn the trade agreed to give a premium, was admitted.

*Merewether*, Serjt. and *Awdry*, contrà, were stopped by the Court.

BAYLEY, J.—Where a contract of hiring contains an  
(a) 5 T. R. 21. (b) 3 D. & R. 330; 2 B. & C. 114. (c) 8 T. R. 379.

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express exception of any particular time, so that during that time the servant is free from the control of the master, that is not a hiring for a year, and service under it will not confer a settlement. We must look at the contract itself, and all the terms of it, to see whether it was of that character, and what the real bargain was in this case. The contract was in writing, and one of the stipulations was, that the servant should observe all the rules of the factory with regard to the hours of attendance and of work. Now the law implies in every contract of hiring an undertaking by the servant to work at all reasonable hours when required. In factories, the ordinary hours of working are, generally speaking, twelve hours a day; but it by no means follows from thence that the master may not on extraordinary occasions require his servants to work at other hours: and whether he does so or not, the relation of master and servant will equally subsist during the whole of the day. It does not appear with any precision, in this case, what the rules of the factory were with regard to the hours of work. But suppose one of them, at the time of making the agreement, to have been, that the servant should work twelve hours a day, still, no minimum being mentioned, and the rules being variable at the pleasure of the master, who did in fact occasionally vary them, a stipulation that the servant should observe all the rules of the factory with regard to the hours of work, would not entitle the servant to say that the master should not require her to work during any reasonable hours. Such a stipulation does not necessarily imply that the servant is not to work beyond certain hours. The true meaning of this agreement, therefore, seems to me to be, that the relation of master and servant should subsist during the whole of the day; and I think that there is no express exception in the contract, and no remission of

the service beyond that which the law implies in every contract of hiring. I am, therefore, of opinion that the order of sessions must be quashed.

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LITLEDALE, J.—I am of the same opinion. In order to constitute a yearly hiring the contract must be such that the relation of master and servant will subsist during the whole of the year, and during the whole of every day in the year. That is generally so, as a matter of course, in the case of domestic servants; but in the case of servants employed in factories it is frequently not so, for there the contract often is, that the servant shall work so many hours in the day. This, though the hiring is in terms for a year, has in many cases been decided to be an exceptive hiring; and I think that the law in that respect has been carried to the utmost length. It seems to me, that unless by the terms of such a contract there is an express exception, which must necessarily prevent the relation of master and servant from subsisting during the whole of the year, or during the whole of every day in the year for which the contract is made, it is a yearly hiring. Here it was part of the contract that the servant should observe the rules of the factory with regard to the hours of work. That is a stipulation which the law implies in every contract of hiring, and it is impossible from thence to infer that there was an exception of any period of time during which the relation of master and servant was not to subsist,

PARKE, J.—I am also of the same opinion. I have no doubt that what passed by parol between the pauper and the foreman, at the time of making the bargain, was not admissible evidence to explain what the bargain was. As to the supposed exception in the agreement, the stipulation that the servant will obey the rules of the

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factory, is really no more than a stipulation to obey the orders of her master, and that the law implies in every contract of hiring.

Order of Sessions quashed (a).

(a) See the next case.

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The KING v. The Inhabitants of BIRMINGHAM.

A pauper was "hired for a year, at 4s. 6d. a week, to work from six in the morning till seven in the evening, and to make as much overwork as he chose:"—

Held, an exceptive hiring, service under which conferred no settlement.

TWO justices, by their order, removed *William Stean*, his wife, and their children, from the parish of Birmingham to the township of Atherstone, both in the county of Warwick; and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, *William Stean*, being settled at Atherstone, and unmarried, went to live with *James Owen*, a button-caster, of Birmingham. After he had been with him some time, *Owen* hired him for a year at 4s. 6d. a week; nothing was said about Sundays. It was a part of the terms of hiring that the pauper was to work from six in the morning to seven in the evening, and might make as much overwork as he chose. He received earnest when he was hired. He served his master under this contract for a year, during which he lived in his master's house and boarded himself. He lived there on Sundays as well as week days, and on Sunday morning he used to ask if there was any thing to be done, and if there was, he did it. He made a good deal of money by overwork, but never did any for any one but his master, and was never paid for it but by him: he was allowed 2d. an hour for overwork. At the expiration of the first year, he was hired by *Owen* for a second year on the same terms, except that he was to have 5s. 6d. a week

wages, and 4*d.* an hour overwork. He served the whole of the second year. He was then hired for and served a third year upon the same terms, except that he was to have 6*s.* a week wages, and 6*d.* an hour overwork.

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*Goulburn*, Serjt., and *Amos*, in support of the order of sessions. This was an exceptive hiring, and the pauper gained no settlement by service under it. Unless the servant is under the control of the master during the whole year, that is, during the whole of every day in the year (*a*), it is not a good hiring for a year. Here he was not so. It was held in *Rex v. North Nibley* (*b*) that a service under a hiring for five years as a colt shearman, to work twelve hours each day, would not give a settlement, because the parties did not stand in the relation of master and servant except for particular hours in the day; the servant was under the master's control during the twelve hours only, and could not be compelled to work at other hours. Here the relation of master and servant continued during thirteen hours a day only; the servant was under the master's control during those hours only, and could not be compelled to work at other hours. *Rex v. Byker* (*c*) is distinguishable from the present case, because there time was mentioned merely as the measure of wages; here the pauper was at all events to receive 4*s.* 6*d.* a week, and to work from six in the morning till seven in the evening; therefore time was not mentioned as the measure of wages. [*Bayley*, J. Is not *Rex v. Kingswinford* (*d*) very like the present case?] They are scarcely distinguishable. There a servant agreed by covenant to serve as an artificer for seven years, and that he

(*a*) See the judgment of *Lit-  
tledeule, J.*, in *Rex v. St. John*,  
*Devizes, ante*, 401.

(*b*) 5 T. R. 21.

(*c*) 3 D. & R. 330; 2 B. & C.  
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(*d*) 4 T. R. 219.

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would not work for any other person, but would continue and be in the service from six in the morning till seven in the evening of each day, except on Sundays. This was held to be a covenant to serve only thirteen hours on working days, and to be his own master on Sundays; for the expression of so many hours is the exclusion of the rest, and, therefore, no settlement can be gained by service under it. And it was thought to make no difference that the servant occasionally worked in the night-time, and often went on errands for his master on Sundays; for where the contract is explicit, it is not how much the servant actually does, but what he has agreed to do, that is to be considered.

*Hill*, contra. This was a good hiring for a year, for there is no *express* exception in the contract (a). The control of the master over the servant never ceased throughout the year; and that is the true test. The servant boarded and lodged in the master's house, which is a strong circumstance to shew a yearly hiring. [*Parke*, J. He boarded himself, and lodged in his master's house: but it was no part of the contract that he should lodge there.] The master by the contract claims to have work during thirteen hours a day; but he does not thereby necessarily or expressly exclude any hour, and the mention of time seems rather to have been adopted as a measure of wages. The law would hardly compel a labour of more than thirteen hours a day. The pauper never worked for any other person, and frequently worked on Sundays. In *Rex v. Byker* (b), the pauper was hired for a year at 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. a day addi-

(a) See *Rex v. St. John*, *De-  
vizes*, ante, 400.

(b) 3 D. & R. 390; 2 B. & C.  
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tional when that time was exceeded, and it was held that this was a conditional and not an exceptive contract, and that the pauper who had served under it for one whole year thereby gained a settlement.

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BAYLEY, J.—This is a very different case from *Rex v. Byker*. There the pauper was hired by indenture, at the wages of 1s. 10d. for a good day's work, not exceeding fourteen hours, and 2d. per day additional when that time was exceeded. A service of more than fourteen hours a day was clearly contemplated there, and the Court thought that the time was mentioned merely as the measure of wages, that the contract did not impose any limit upon what might reasonably be required by the master, and that the relation of master and servant subsisted during the whole twenty-four hours. Here the stipulations are that the servant shall receive fixed wages, that he shall work from six in the morning till seven in the evening, and that he may make as much overwork as he chuses. But he could not have been compelled to make any overwork; he had a right any and every evening to say to his master, "I have worked thirteen hours to-day, and I will work no more till to-morrow." This is clearly an exception in the contract, limiting the control of the master over the servant to thirteen hours a day; beyond that period the master had no right to compel work, nor was the servant under any obligation to perform it.

LITTLEDAL, J.—I am of the same opinion.

PARKE, J.—I think this is a very clear case of exceptive hiring.

Order of Sessions confirmed.

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The KING v. The Inhabitants of TAUNTON ST. JAMES.

A local militia-man hired himself to serve for a year, without disclosing to his master the fact that he was in the militia:— Held, that this was not a lawful hiring within 3 *W. & M.* c. 11, s. 7, the servant not being *sui juris*, or capable of so hiring himself, notwithstanding the provisions of 43 *G.* 3, c. 111, ss. 15 & 24, the local militia act in force at the time.

TWO justices, by their order, removed *W. G. Palmer*, his wife and children, from the parish of Taunton St. James to the parish of Milverton, both in the county of Somerset; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

The pauper, aged about thirty-eight years, lived in the parish of Langford Budville, in Somersetshire, till he was about seven years of age, when he was bound apprentice by the parish officers to Mr. *John Locke*, of that parish, yeoman, and served him in that parish till he, the pauper, was twenty-one years old. The pauper afterwards, at Lady-day, 1811, hired himself as servant in husbandry for a year from that time to Mr. *Thomas Handford* of Milverton; and after serving him three months, having at Christmas preceding volunteered into the local militia, he went out into actual service for three weeks, and then returned to Mr. *Handford's* service till Lady-day, 1812, and then received his wages after deducting for the three weeks he was absent in the militia. The pauper's agreement with Mr. *Handford* was for a year's service, at the wages of 11*l.* and his board and lodging. The pauper did not tell Mr. *Handford*, when he first bargained with him, that he was in the militia; but told him a week or two afterwards; and Mr. *Handford* said it did not signify, for the pauper could, at the end of the year, deduct for the time he was absent.

*Rogers* and *Bere*, in support of the order of sessions. The recent case of *Rex v. Holsworthy* (a) is decisive of the present. There a militia-man hired himself for a year, and served a year under such hiring. It did not

(a) 9 D. & R. 322; 6 B. & C. 283.



appear that at the time of the hiring he told his master that he was a militia-man. It was held that he gained no settlement. And upon two grounds, both of which apply to the present case; first, that the pauper, at the time of the hiring, was not capable of making a contract, so as to give the master a control over his services during the year; and secondly, that as the pauper did not communicate to his master that he had entered into the militia, the hiring was not conditional, but an absolute hiring for a year (*a*). Here the pauper, at the time of the hiring, did not communicate to his master that he had volunteered into the militia; therefore he entered into an absolute contract, which he was incapable of doing. The fact here, of the pauper's disability being afterwards communicated to the master, cannot alter the case, because the contract was already made; or if it can be considered that a new contract was made at the time of the communication, that was not a contract for a year: *Rex v. Sulgrave* (*b*); *Rex v. Rushall* (*c*). But even if that contract had been sufficient, still there was not a continuing service under it sufficient to confer a settlement. This appears from the judgment of *Bayley, J.*, in *Rex v. Holsworthy* (*d*). The other side will probably rely upon the cases of *Rex v. Winchcomb* (*e*), and *Rex v. Westerleigh* (*f*), but they were virtually overruled by the case of *Rex v. Beaulieu* (*g*). The interval which occurred while the pauper was serving in the militia, cannot be considered as dispensed with by the master, for he cannot be said to have dispensed with a service which he could not enforce; and the pauper was compelled to serve in the militia by a power paramount to

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(*a*) See the judgment of *Holroyd, J.* 9 D. & R. 327.

(*b*) 2 T. R. 376.

(*c*) 7 East, 471.

(*d*) 9 D. & R. 326.

(*e*) Cald. 94; Doug. 391.

(*f*) Burr. S. C. 753.

(*g*) 3 M. & S. 229.

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that of the master. It will, perhaps, be attempted to draw a distinction between liability to serve in the general and liability to serve in the local militia; but the Court will find that no such distinction can be sustained.

*Erle and Follett*, *contra*. The contract of hiring entered into in this case is in express terms rendered effectual to confer a settlement by the militia act in force at the time, 48 *Geo.* 3, c. 111. It is provided by the fifteenth section of that statute, "that no ballot, inrolment and service under that act, shall extend to make void, or in any manner to affect any indenture of apprenticeship, or contract of service, between any master or servant, notwithstanding any covenant or agreement in any such indenture or contract: and that no service under that act of any apprentice or servant shall be deemed, or construed and taken to be an absence from service, or a breach of any covenant or agreement, as to any service, or absence from service, in any indenture of apprenticeship or contract of service." [*Littledale, J.* I think that clause clearly applies retrospectively to services previously entered into; to contracts existing at the time of the inrolment: not prospectively to contracts made afterwards.] The words used in that section are "*any contract*," and "*any service*;" those words, taken in their ordinary sense, must mean *all* contracts and services, whether entered into or existing before or after the inrolment. [*Littledale, J.* Suppose the words "or in any manner to affect" had been omitted, and the only words used had been "to make void any indenture of apprenticeship or contract of service;" would not that section then have been confined to contracts existing at the time of the inrolment?] The words "in any manner to affect" are words of substance, and cannot be rejected. The pauper in this case was a volunteer, but the twenty-

fourth section of the act declares, that all persons voluntarily inrolling themselves shall serve in the same manner, and under the same regulations, and subject to the same provisions, as if they had been balloted for under the act. That shews that the statute was intended to have a general, and indeed an universal operation. Subsequent militia acts passed which made no alteration in the law at all affecting this question; and they were all repealed by the 52 *Geo.* 3, c. 68, the sixty-third section of which contains the original provision as to service. [*Bayley*, J. But the words of that section, by reference to the sixtieth section, are clearly confined to contracts existing at the time of the enrolment. That is a legislative exposition of their meaning in the prior statute, for the same words applied to the same subject-matter in statutes in *pari materiâ* ought to receive the same construction.] The words of the fifteenth section of the 48 *Geo.* 3, c. 111, must be construed according to their plain and ordinary meaning, and not by reference to the meaning in which they are used in another statute subsequently made. But, independently of the statute, there is a sufficient hiring and service here to confer a settlement. *Rex v. Westerleigh* (a), and *Rex v. Winchcomb* (b), are extremely strong authorities; the former was much considered in the latter; and neither of them has ever been overruled. [*Bayley*, J. But in both those cases the fact of the servant being in the militia was communicated to the master at the time of the hiring. That is the important distinction between those cases and the present.] In this case the fact was communicated a week or two after the first hiring, and what then took place constituted a second valid hiring. [*Bayley*, J. If there was a hiring for a year then, there clearly was not a service for a year under it. *Parke*, J. There was

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(a) Burr. S. C. 753.

(b) Cald. 94; Doug. 391.

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not a hiring for a year then. The second hiring, if any, was for a period less than a year. A hiring cannot be retrospective.]

BAYLEY, J.—I consider this case as depending entirely upon the construction of the fifteenth section of the statute 48 *Geo. 3*, c. 111. By the statute 3 *W. & M.* c. 11, s. 7, the party claiming a settlement by hiring and service must have been lawfully hired for a year, and have served a year. With reference to the meaning of the phrase “lawfully hired,” it has been long established that the party hiring himself must be *sui juris*—must be capable of rendering that service which he contracts to render. Upon this principle it has been decided that neither a deserter from the King’s service, *Rex v. Norton-juxta-Kempsey* (a), nor an invalided soldier having leave of absence, *Rex v. Beaulieu* (b), nor a militia-man, *Rex v. Holsworthy* (c), can lawfully hire himself for a year so as to acquire a settlement. In the case last mentioned a person who was inrolled as a substitute in the militia, hired himself for a year, and served a year under such hiring. It did not appear that at the time of the hiring he told his master that he was in the militia. It was held, that he acquired no settlement. Now the decision in that case must govern our judgment in the present, unless it is distinguishable from it by reason of the provision contained in the statute 48 *Geo. 3*, c. 111, s. 15. That section provides, “that no ballot, inrolment and service under that act, shall extend to make void, or in any manner to affect any indenture of apprenticeship, or contract of service between any master or servant, notwithstanding any covenant or agreement in any such indenture or contract; and no service under that act of

(a) 9 East, 207.

(b) 3 M. & S. 229.

(c) 9 D. & R. 322; 6 B. & C.  
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any apprentice or servant shall be deemed, or construed, or taken to be an absence from service, or a breach of any covenant or agreement as to any service, or absence from service, in any indenture of apprenticeship or contract of service, any thing contained in any act or acts of parliament, or law or laws, or deed or indenture of apprenticeship, or contract of service, to the contrary notwithstanding." Those words, taken as they there stand, *may*, undoubtedly, apply to *all* indentures of apprenticeship or contracts of service, both those existing at the time of the ballot or inrolment, and those made afterwards. The question is, whether they *do* apply to *all* contracts whatever, or whether they are confined to such as were in existence at the time of the ballot or inrolment. Now for the purpose of ascertaining the sense in which they are used in this act of parliament, we may fairly look to other acts of parliament relating to the same subject-matter; and if we find the very same words used in a limited and restricted sense in those acts, we ought to construe them in the same sense in this; for it is a legitimate rule of construction that the same words in two statutes in *pari materia*, should receive the same meaning. No such words are to be found in the preceding statute 42 *Geo. 3*, c. 80; but they are to be found in the sixty-third section of the succeeding statute 52 *Geo. 3*, c. 68; and if they are there used in a sense limited and restricted to contracts existing at the time of the ballot or inrolment, they ought to receive the same construction in the fifteenth section of the 48 *Geo. 3*, c. 111. Now those words in 52 *Geo. 3*, c. 68, s. 63, are clearly confined to contracts existing at the time of the ballot or inrolment. The sixtieth section enacts, that the inrolment of servants shall not vacate or rescind contracts between master and servant, unless the local militia shall be called out, or the person inrolled

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shall leave the service for the purpose of being trained. That must apply exclusively to contracts existing at the time of the inrolment, because contracts not in existence could not be vacated or rescinded. The sixty-third section is a transcript of the fifteenth section of the 48 *Geo. 3*, c. 111. It begins "Provided always," and then proceeds in the same words. Now a proviso in an act of parliament is something engrafted on and referring to a preceding enactment, and the proviso in the sixty-third section evidently refers to the enactment in the sixtieth section, which being limited and restricted to contracts existing at the time of the inrolment, the proviso also must be read as limited and restricted in the same manner. Such being the fair meaning of these words in the 52 *Geo. 3*, c. 68, s. 63, they ought to receive the same construction in the 48 *Geo. 3*, c. 111, s. 15, and giving them that construction, there is nothing in that statute enabling a person in the situation of this pauper to hire himself for a year so as to acquire a settlement. The clause ends with a proviso as to service; that may make the service good; but assuming the service in this case to have been sufficient, I should come to the same conclusion, because my opinion is founded, not on any defect in the service, but on the want of a capacity to contract. I think the pauper was not at the time of the hiring *sui juris*—not capable of contracting to render the service which he did contract to render, and therefore that he gained no settlement by the hiring and service in the parish of Milverton. I am, therefore, of opinion that the sessions came to a right decision in this case, and that their order quashing the order of removal to Milverton ought to be confirmed.

LITLEDAL, J.—I am of the same opinion. The concealment of the important fact of the pauper's having

volunteered into the militia destroyed the hiring. It is a general principle both in law and morals, that when a man enters into a contract, he ought either to be able to perform it, or to inform the person with whom he contracts of his disability. It is contended that the fifteenth section of the 48 *Geo.* 3, c. 111, extends not only to contracts existing at the time of the enrolment, but to contracts subsequently made. It seems to me that the words "make void," *ex vi termini*, apply to contracts in esse; but supposing that to be doubtful, still calling in aid the principle to which I have alluded, and which ought not to be lost sight of in construing words of doubtful import in an act of parliament, it is clear that this section must be read as extending only to contracts existing at the time of the enrolment: and it follows that in order to gain a settlement by a contract of hiring made after enrolment, a party must disclose his disability to the person with whom he contracts. This would be my view of the question, even taking the 48 *Geo.* 3, c. 111, s. 15, as standing alone; but coupling that section with the subsequent act of 52 *Geo.* 3, c. 68, s. 63, and construing the one with reference to the other, which, for the reasons so fully stated by my brother *Bayley* I think we ought to do, I am decidedly of opinion that there was no lawful hiring in this case, and therefore that no settlement was acquired by the service under it.

PARKE, J.—Was there a lawful hiring for a year at Lady-day, 1811? That is really the only question in this case. There may have been a sufficient service; I incline to think that there was: but there clearly was no lawful hiring for a year. Assuming that the subsequent conversation between the master and the servant amounted to a second hiring, that was not a hiring for a year, but for a period less than a year. Then as to the

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first hiring—that was for a year; but to constitute a lawful hiring, the party must have ability to contract for the period during which he agrees to serve. *Rex v. Holsworthy* (a) shews, that where a party is under a disability, he may, by disclosing it to the person with whom he contracts, make a conditional hiring; but that if he conceal it, he makes an absolute contract which he is incapable of making, and which is, therefore, not a lawful hiring. Here the disability existed, but was not disclosed. Then does the 48 *Geo. 3*, c. 111, remove this disability? It cannot be supposed that the legislature intended to enable a local militia-man to make an absolute contract of hiring, for that would be to enable him by law to commit a fraud; for the master would contract in the belief that the servant had power to bind himself for a year, the latter knowing at the time that he had not. But the legislature might well intend to provide that a contract made *bonâ fide* and while the party was *sui juris*, should not be avoided by his being subsequently drawn for the militia. The statute does not in express terms enact that a militia-man shall be *sui juris*, for the fifteenth section is clearly confined to contracts existing at the time of the ballot or enrolment. Coupling that section with the twenty-fourth, I have some doubt whether a volunteer and a balloted man stand in precisely the same situation. But supposing they do, all that the legislature says is, that a master who contracts with a free man shall take his chance of a ballot, and shall not contract against that chance; but there is no provision that a volunteer or a balloted man shall have the same capacity to contract as a free man. No power, therefore, is given to such persons to enter into an absolute contract of hiring and service for a year. Here the

(a) 9 D. & R. 322; 6 B. & C. 283.



pauper did enter into such a contract when he had no power to do so: therefore that was not a lawful hiring, and no settlement was gained by service under it.

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Order of Sessions confirmed.

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TWO justices, by their order, removed *James Smith* and his wife and children from the parish of Birmingham, in the county of Warwick, to the parish of Tipton, in the county of Stafford; and the sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:—

*James Smith*, the pauper, gained a settlement by hiring and service in the parish of Tipton, in the year 1820. About two years afterwards he entered into the following agreement, in writing, with *John Tompson* of King's Morton, in the county of Worcester:—

“An agreement made the 4th day of October, 1822, between *John Tompson*, of King's Morton, in the county of Worcester, plumber, glazier and painter, of the one part, and *James Smith*, aged about twenty-eight years, one of the sons of *Jacob Smith*, of Solihull, in the county of Warwick, of the other part. The said *James Smith* and *Jacob Smith* do severally promise and agree that the said *James Smith* shall and will serve the said *John Tompson* as an *articled servant*, for the term of four years, to commence from the 4th of October, 1822, to learn his art or trade of plumber, glazier and painter, at the wages of 6s. a week for the first year, 7s. a week for the second year, 8s. a week for the third year, and 9s. a week for the fourth year; and it is agreed that the said

An adult contracts to serve a plumber as an articled servant for four years, to learn his trade, at weekly wages; to be considered as an out-apprentice; to do gardening or any other work his master set him about; and, when ill, not to receive wages; the master agreeing to teach him his trade. This is not a contract of hiring and service, but an imperfect contract of apprenticeship, service under which does not confer a settlement.

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*James Smith* shall be considered as an *out apprentice*; and the said *James Smith* and *Jacob Smith* shall and will find and provide for the said *James Smith* sufficient meat, drink, washing, lodging and clothing, and all other necessaries, during the said term; and the said *James Smith* shall and will do and perform gardening or any other work his master shall set him about during the said term. And in case the said *James Smith* shall be ill and unable to work, or shall absent himself from his master's business, or lose any time during the said term, that the said master shall not pay him any wages during the time he shall be ill or lose any time as aforesaid. And that the said *James Smith* shall and will faithfully serve his said master in all lawful business during the said term, and shall and will behave himself honestly, orderly and obediently, during the said term; and the said *John Tumpson* doth promise and agree that he will *teach and instruct* the said *James Smith* in the art and mystery of a plumber, glazier and painter, during the said term, in the best manner that he can, and that he will pay the wages above set forth to the said *James Smith* during the said term; and the said parties do hereby severally bind themselves for the true and faithful performance of all the agreements above set forth, at all times during the said term."

This agreement was signed by the parties, and attested by two witnesses, but it was not sealed or stamped. The pauper served *Tumpson* under this agreement for more than a year, and boarded and lodged during that time at *Tumpson's* house, in the parish of King's Morton.

*Amos and Hill*, in support of the order of sessions. The effect of the decision of the sessions is, that they were not convinced that the parties contemplated a contract of hiring and service. The question is, whether they should have been so convinced under the circum-

stances; the answer is, no; for the contract is clearly an imperfect contract of apprenticeship, and not a contract of hiring and service. The rule laid down in *Rex v. St. Margaret's, King's Lynn* (a), and recognised in *Rex v. Combe* (b), is this:—"Where it appears, from all the circumstances, that the parties, at the time of making the contract, intended to create the relation of master and apprentice, the contract must be construed as one of apprenticeship; and then, if it is a defective apprenticeship, no settlement can be gained by service under it. Where, on the other hand, it appears that the parties intended to create the relation of master and servant, the contract must be construed as one of hiring and service, and a settlement will be gained by service under it" (c). In this case, as in the cases cited, there are circumstances, some tending to the inference that an apprenticeship, others that a hiring and service, was intended; and the question will be, which, upon the whole, appears to have been the paramount, and which the subordinate object of the parties. The fact that no premium was paid will be relied upon by the other side; but though "the payment of a premium is cogent evidence to shew that an apprenticeship was intended, it is not conclusive; and much less is the absence of a premium evidence to shew that a hiring and service was intended" (d). Another point made on the other side will be, that the master agreed to pay weekly wages; but that does not justify the inference that a hiring and service was intended, for the payment and receipt of wages are not inconsistent with the relation of master and apprentice: *Rex v. Rainham* (e). The pauper in this case was to "serve as an articulated servant," but he was

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(a) 9 D. & R. 160; 6 B. & C. 97. (d) Per Bayley, J. 9 D. & R. 163.

(b) 2 M. & R. 30; 8 B. & C. 82. (e) 1 East, 531.

(c) Per Bayley, J. 9 D. & R. 163.

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also to be "*considered as an out apprentice;*" and it must be remembered that an apprentice is a servant. By holding this agreement to constitute an imperfect contract of apprenticeship, effect will be given to both those words, servant and apprentice; and effect should be given, if possible, to every word in an agreement. Though the pauper was to serve as an articulated servant, it was for a purpose strongly indicative of an apprenticeship, namely, "to *learn* the art or trade of a plumber;" and in a subsequent part of the agreement the master undertakes "to *teach and instruct* the pauper in the art and mystery of a plumber." The father of the pauper being a party to the agreement, is also a circumstance leading to the inference of an apprenticeship rather than a hiring and service. At all events, the intention of the parties being doubtful, and the question of intention being one of fact, the Court will not disturb the finding of the sessions upon it.

*Waddington*, contra. The paramount intention of the parties, as appearing from the terms of the agreement taken altogether, seems to have been to create the relation of master and servant, and not that of master and apprentice. The question of intention is not a question of fact, but of law, and is to be decided upon the legal construction and effect of the agreement. *Rex v. Rainham* (a) is no authority on one side or the other, as there it was unnecessary to decide whether the contract was one of apprenticeship or of service, because the pauper having served under it for more than a year, gained a settlement either as an apprentice or as a hired servant. Here it is twice stated in the agreement that the pauper is to *serve*; he is called a *servant*; he is to do gardening or any other work his master may set him about; he is

(a) 1 East, 531.

to receive wages, and no premium is paid with him. All these are indicia of service. No contract in which the word *servant* has been used has ever yet been held to be a contract of apprenticeship. *Rex v. Coltishall* (a) is very like the present case. There *A.* clubbed with *B.* for three years, (which signifies one person contracting to serve another for the purpose of being taught some art or trade,) and also agreed to do any work that *B.* set him about; and it was held that *A.* gained a settlement by serving *B.* under that contract for a year. Lord *Kenyon* there said, that the stipulation that the pauper was to do any work his master set him about, was decisive to shew that he must be considered a *hired servant*. That case was recognised and acted upon in *Rex v. Martham* (b), which is still more like the present. There *A.* clubbed with *B.* for three years, at weekly wages, with a proviso that if he were prevented from working by bad weather, illness, or want of employment, there should be a proportionate deduction of wages; and it was held that he gained a settlement by serving a year under this hiring, though occasional deductions on these accounts were made. The statement in this case, that the pauper shall be considered as an out-apprentice, is outweighed by his agreement to serve as an articulated servant. There are many cases shewing that mutual agreements to learn and to teach a trade do not, per se, constitute an apprenticeship. *Rex v. St. Margaret's, King's Lynn* (c), and *Rex v. Combe* (d), both differ from this case, because there no wages were paid; in the former also it was intended to have indentures, but none were executed *on account of the poverty of the mother*; and in the latter it was intended to hire the pauper out to service, but it was afterwards thought better that he

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(a) 5 T. R. 193.

(c) 9 D. &amp; R. 160; 6 B. &amp; C. 97.

(b) 1 East, 239.

(d) 2 M. &amp; R. 30; 8 B. &amp; C. 82.

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should go to learn a trade, *instead of going to service*. [Bayley, J. Are there any cases where the master expressly contracted to teach, and yet the contract was held to be a contract of service?] *Rex v. Little Bolton (a)*, and *Rex v. Eccleston (b)*, are cases precisely of that description.

BAYLEY, J.—We despair of reconciling all the cases upon this subject; but we will look into them, and consider of this case.

*Cur. adv. vult.*

BAYLEY, J. now delivered the judgment of the Court.—The question in this case was, whether the contract in respect of which the settlement was claimed was a contract of hiring and service, or a defective contract of apprenticeship; for it was admitted, and was indeed clear beyond doubt, that if it was a contract of apprenticeship it was defective, and that service under it would not confer a settlement. It is a case of great doubt, but upon the whole we think that apprenticeship was the object in view by the parties to the contract. The agreement, to which the pauper's father was a party, was, that the pauper should serve one *Tompson* as an articulated servant for four years, to learn his art or trade of a plumber, at certain weekly wages, and that the pauper should be considered as an out-apprentice. In this instrument the pauper is described both as an articulated servant and as an apprentice; we must, therefore, look to the whole of the instrument to learn whether the parties contemplated the relation of master and servant, or that of master and apprentice. Now, first, it is not usual for a father to be a party to a contract whereby his son, of full age, contracts to serve. The fact of the

(a) Cald. 367.

(b) 2 East, 298.

pauper having contracted to do gardening or any other work, does not necessarily shew that the parties contemplated a mere hiring. In *Rex v. Combe* (a) the pauper was to do any other work as well as that of a carpenter, and yet the contract there was considered to be an imperfect contract of apprenticeship. So, the stipulation to pay wages does not necessarily imply that the parties contemplated the relation of master and servant. Here the master undertook to teach the pauper his trade, so that the learning a trade was clearly one great object of the parties to the contract. There is a provision in the instrument, that if the pauper should be ill the master should not pay him any wages during the time of his illness. That is by no means an improper stipulation in a bargain for an apprenticeship, but in the case of a hiring and service the law imposes on the master the obligation of providing for a servant during illness. There are some circumstances in this case tending to shew that the parties contemplated a contract of apprenticeship, and others that they contemplated a contract of hiring and service. But upon the whole, as it appears that the main object of the parties was that the pauper should learn the trade of his master, and as the Court of Quarter Sessions may probably have thought the wages too low to be considered as a remuneration for mere service, we think, though the case admits of great doubt, that this contract was an imperfect contract of apprenticeship. The order of sessions must, therefore, be confirmed.

Order of Sessions confirmed.

(a) 2 M. & R. 30; 8 B. & C. 82.

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It is not necessary, in establishing a settlement under 59 Geo. 3, c. 50, to prove that the tenement is of the actual value of 10*l.* a year: it is sufficient if it be proved to have been bonâ fide hired at that sum.

TWO justices, by their order, removed *W. M. Miller* and his wife and children from Snape to Ashfield-cum-Thorpe, both in the county of Suffolk. The sessions, on appeal, confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, who was previously a settled inhabitant of Ashfield-cum-Thorpe, after the passing of the 59 Geo. 3, c. 50, and before the passing of the 6 Geo. 4, c. 57, bonâ fide hired a house and land for one whole year in the parish of Snape, at a rent exceeding 10*l.*, which he held and occupied, and paid that rent for, more than one year; though at the time the value of the holding and occupation was under 10*l.* a year.

*Brodrick*, in support of the order of sessions. By the 13 & 14 Car. 2, c. 12, the power of removal was confined to persons coming to settle upon tenements under the yearly value of 10*l.*; so that down to the passing of the 59 Geo. 3, c. 50, all persons coming to settle upon tenements above the yearly value of 10*l.* acquired settlements. The latter statute did not alter the law with respect to the value of tenements, but required in addition that they should be bonâ fide hired for the sum of 10*l.* by the year. This appears from the 6 Geo. 4, c. 57, which, after reciting that the settlement of the poor had been made in some instances to depend upon the annual value of tenements, and that the ascertaining such value had given rise to very expensive litigation, repeals the 59 Geo. 3, c. 50, and enacts, among other things, that it shall not be necessary to prove the value of such tenement. That amounts to a legislative exposition of the meaning of the 59 Geo. 3, c. 50, namely,



that it did not alter the law as to the value of the tenement; proof, therefore, that the tenement in this case was of the yearly value of 10*l.*, was necessary, and that fact having been disproved, no settlement was acquired.

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BAYLEY, J.—The statute 59 *Geo.* 3, c. 50, requires that the tenement shall be *bonâ fide* hired at and for the sum of 10*l.* by the year. I think that does not mean that the tenement shall be worth 10*l.* by the year, but that it leaves the actual value immaterial, provided the tenement is *bonâ fide* hired at 10*l.* by the year. The proviso in the 6 *Geo.* 4, c. 57, “that it shall not be necessary to prove the actual value of the tenement,” was, I apprehend, introduced merely for greater caution.

LITLEDALE, J.—I am of the same opinion.

PARKE, J.—One great cause of the disputes and controversies mentioned in the preamble of the 59 *Geo.* 3, c. 50, was the necessity of proving the value of the tenement. The object of that statute was to prevent litigation, and it requires that the tenement shall be *bonâ fide* hired at the sum of 10*l.* by the year. Generally speaking, the rent agreed upon between landlord and tenant is the best criterion of value; and I think the legislature intended to dispense with any other evidence of value. Where it appears that the value of the tenement is considerably less than 10*l.* a year, that is evidence to shew that it was not *bonâ fide* hired at that sum. Where it is *bonâ fide* hired at that sum, I think that is sufficient.

Order of Sessions quashed.



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## The KING v. The Inhabitants of LOWER MITTON.

The tolls payable for passing through locks belonging to a canal company, are ratable to the poor *wholly* in the parish in which the locks are situate.

**BY** a rate made in February, 1826, for the relief of the poor of the hamlet of Lower Mitton, in the parish of Kidderminster, in the county of Worcester, the Staffordshire and Worcestershire Canal Company were rated for their basins, towing-paths, and that part of their canal, and the locks thereon, lying within Lower Mitton, and for the tolls and dues arising therefrom due at Lower Mitton, on 4000*l.*, at the sum of 200*l.* On hearing an appeal against the rate the sessions amended the rate by reducing the sum for which the company were rated from 4000*l.* to 706*l.* 9*s.* 6*d.*, subject, as to the lock duties hereinafter described, to the opinion of this Court upon the following case:—

By an act of 6 *Geo.* 3, the company are authorised to take rates and duties for tonnage and wharfage for all goods conveyed on the canal, not exceeding three halfpence per mile for every ton, and so in proportion for any greater or less quantity than a ton. By another act of 10 *Geo.* 3, the company are authorised to take tonnage proportionably for any distance less than a mile which any commodities shall be conveyed on the canal, *and the boats, barges, and other vessels passing through the two locks* erected between the river Severn and the canal basin, are to pay a toll or lock due of one penny per ton, in lieu of the tonnage of three halfpence per mile fixed by the previous act of 6 *Geo.* 3. The canal basin is twelve feet below the level of the canal, and twenty-four feet above that of the Severn, with which it communicates through the two locks mentioned in this enactment. These locks receive the necessary supply of water from the basin, which is itself supplied partly from the canal and partly from the Severn. The supply from the Severn is raised by means of a steam-engine,

which is used for no other purpose than to raise this supply. The lock dues received by the company for boats, barges, and other vessels passing through these locks, from November, 1825, to November, 1826, amounted to 350*l*. The locks, basin, and steam-engine, are locally situate in the hamlet of Lower Mitton. The boats, barges, and other vessels, which pass through these locks, for the most part bring into the basin cargoes to be taken up the canal, and which in fact are subsequently so taken, or take out of the basin cargoes which have been brought down the canal; and the toll of one penny per ton is due and paid for merely passing through the two locks from the canal basin to the Severn, and vice versa. The barges that pass from the Severn into the canal basin cannot navigate the canal, and the boats that come down the canal rarely pass into the Severn, but transship their cargoes in the basin into the Severn barges; and the toll for passing the two locks is in both cases paid for the barges and boats. If a canal boat pass into the Severn from the basin, it pays the lock dues in addition to the milage dues paid for carrying goods along the canal. The lock dues paid as above stated are the only profits which the company derive from the Severn locks.

The Court of Quarter Sessions were of opinion that the profits of the locks were not ratable in Lower Mitton only, but that they should be divided among all the parishes through which the canal runs, in proportion to the length of canal in each parish, in the same manner as the general profits of the canal were divided.

If this Court shall be of opinion that the sessions were wrong, the rate is to be amended by increasing the amount at which the company are rated from 706*l*. 9*s*. 6*d*. to 1056*l*. 9*s*. 6*d*.

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*M' Mahon, Whateley, and Halroyd*, in support of the order of sessions. If the milage dues of three halfpence per ton are, for the purpose of rating, properly divided among all the parishes through which the canal runs, it will follow that the lock dues of one penny per ton should be divided in the same manner; for there is really no distinction between them; the latter are merely substituted in lieu of the former. Now the milage dues are properly divided among all the parishes through which the canal runs. The principle is fully established, that the tolls of a canal are ratable as the profits of land, *Rex v. Milton* (a); and it cannot be disputed that the profits of land are ratable in the parish in which the land producing them lies. If there be one entire profit produced by land lying in several parishes, that profit must be divided among the several parishes, in the proportion in which the land in each parish contributes to produce it. In the case of a canal, where the water is constantly flowing from one part to another, all the land over which the water flows contributes to the general navigation. The portions of land lying in different parishes combine, simultaneously, to supply the navigation in one parish. The price paid for that navigation being thus earned by all the land, is the profit of all the land; therefore that profit must be divided equally among all the parts of the canal; in other words, among all the parishes through which the canal runs, in proportion to the quantity of land lying in each. If the tolls of a navigation are to be deemed the profit, not of all the land employed in furnishing the navigation, but of that part of it only over which the navigation is in fact made, it may happen that the land over which no navigation takes place will have no profit at all assigned to it. Suppose this case:—A canal is commenced in the parish

(a) 3 B. &amp; A. 112.

of *A.*, not for the purposes of navigation *there*, but merely to obtain a supply of water. The canal is not navigated in the parish of *A.*, but is navigated in other parishes, and large profits arise from the use of the water supplied in the parish of *A.* It cannot be said that the land in the parish of *A.* produces no profit, but it will be ratable only in respect of the profits which it contributes to the earning of in other parishes. In *Rex v. The New River Company* (*a*) it was found that a certain piece of land, rated at 300*l.* a year, was, if not covered with water, worth only 5*l.* a year; but if the advantage which the company derived, in other parishes, from the use of the water, might by law be included in the rate upon the land in which the water arose, the land and water together were of the annual value at which they were rated; and the Court held that that advantage might by law be included in that rate. That case is in principle not distinguishable from the present. There, the water was conveyed to other parishes by pipes under ground, here, in trenches above ground; there, it was sold to housekeepers for domestic purposes, here, it is sold to bargemen for the conveyance of their goods. *Rex v. The Mayor of Bath* (*b*), *Rex v. The Rochdale Water Works* (*c*), and *Rex v. Palmer* (*d*), all concur in establishing this principle; and in the latter *Abbott*, C. J., said, "Here the navigation runs through fourteen different parishes, and the whole is rated in one parish. Now having decided that a canal is ratable in each and every parish through which it passes, it follows that this rate should have been divided into fourteen different portions, instead of being imposed entirely in one parish. If this were not so, the navigation might be rated twice over. The principle upon which this is

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(*a*) 1 M. & S. 503.(*b*) 14 East, 609.(*c*) 1 M. & S. 634.(*d*) 2 D. & R. 793; 1 B. & C. 546.

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founded is very plain and simple. I have the utmost reverence for the learning of the judges who decided some of the former cases upon questions of this nature, where a contrary doctrine has been held, but still, of late years, the Court has been gradually coming to what is the true principle, and unquestionably the common sense of the thing, namely, that in whatever parish the land is occupied, as land covered with water, and is productive of profit to the proprietor, it is to be rated in each and every parish, according to the profits it produces, although they may not be received in that parish, but in another and different parish." (a) [Parke, J. If in one parish there were several locks, and by reason of the expense of erecting and maintaining them, there were a larger sum payable than in other parishes, would you say that the charge of those locks, for the purpose of ascertaining the rate, should be made with reference to the expense in the particular parish, or with reference to the general fund?] To the general fund, certainly. The locks alone might in many cases prove to be a loss in the particular parish, unless the expenses were chargeable to the general fund. Secondly, the lock dues must be apportioned in the same manner as the milage dues. The lock duty of one penny per ton is given expressly *in lieu* of the milage duty of three halfpence per ton. If the one constitutes a general profit divisible among all the parishes, why should not the other? The locks are a part of the canal, and the lock dues are merely substituted for the milage dues upon that particular part of the canal. The other locks upon this canal are not distinguished as respects the toll from the general line of the navigation; the toll for passing through them, therefore, must clearly be distributed along the whole line of the canal: and it seems difficult to say why a

(a) 2 D. & R. 797.

different rule should be applied to the two Severn locks, the toll of which differs from that of the others only in amount, that difference of amount being only sufficient to meet the increased expense of maintaining the Severn locks. [*Parke, J.* Suppose these locks belonged to one person, and the rest of the canal to others, where should the lock dues be rated?] In Lower Mitton, no doubt; because then, though the profits would be earned by means of water coming along the whole line of the canal, it would not come from *his* land. The cases in which the profits of a lock arising exclusively from land lying within the parish have been held to be wholly ratable in that parish, do not apply, because here the profits arise in part from land lying in other parishes. *Rex v. Kingswinford* (a) will doubtless be relied on for the other side, but that case is distinguishable from the present, for there it could not be pretended that one of the three canals contributed to produce the toll given in respect of the others. That decision, therefore, cannot affect this case; and though it may be endeavoured to give the observations of *Bayley, J.* there a more extended application than they were intended to have, they must be construed with reference to the circumstances of the particular case: if they were understood as having a more general application, they would be at variance with the principle laid down in *Rex v. Palmer* (b).

*Shutt, contra.* The case of *Rex v. Kingswinford* (a) is not distinguishable from the present, and shews clearly that the company should be rated for these lock dues wholly in the hamlet of Lower Mitton. The fallacy of the whole argument on the other side is, that it assumes the water to be rated instead of the land. If that argument is well founded, every parish in which there

(a) 1 M. & R. 20; 7 B. & C. 236. (b) 2 D. & R. 793; 1 B. & C. 546.

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is the smallest contributory stream, may rate the company for the proportion of its meritorious services in bearing a part of the water, the whole of which, it is said, earns these dues; and all the land over which the Severn passes, from its source in Plinlimmon to the hamlet of Lower Mitton, will be entitled to participate in these dues, because a part of the water by which they are earned is supplied by the Severn. It might as well be contended that the approaches to a bridge are entitled to participate in the tolls of a bridge, because, without those approaches, no person could reach the bridge, and no toll could be earned. *Rex v. Cardington* (a) is decisive upon this point. *Rex v. The New River Company* (b) is an essentially different case: there were no boats there; the profit was derived not from the use of the water, by working boats along the canal, but by the sale of the water itself. In *Rex v. Palmer* (c), *Abbott, C. J.*, said, "This is very different from the case of a sluice. In that case the tolls become due for the use of the sluice itself, and the proprietor must contribute to the relief of the poor in that parish where the sluice is situate" (d). Here the toll becomes due for the use of the lock, and the same consequence follows.

The case was argued on a former day in these sittings, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J.—The question in this case was, whether the profits of some locks which were situate in Lower Mitton, were ratable in all the different parishes through which the canal to which they appertained ran, in proportion to the land in each parish; or whether they

(a) Cowp. 581.

(b) 1 M. & S. 503.

(c) 2 D. & R. 793; 1 B. & C. 546.

(d) 1 B. & C. 550.



were to be rated wholly in the parish in which the locks were situate. The sessions were of opinion that they were to be rated throughout the whole line of the canal, proportionably in each parish; and we are of opinion that their decision was wrong. It is fully established by *Rex v. Milton* (a), and *Rex v. Palmer* (b), that the profits of a canal or navigation are ratable as the profits of land covered with water in the particular parish in which the land lies; and it follows from thence, and was so decided in *Rex v. Kingswinford* (c), that they are ratable in each parish in proportion to the profit which that part of the land covered with water which lies in the parish produces. If it is more productive in some than in other parts of the canal, either because there is more traffic or because larger tolls are due upon it, or because the outgoings and expenses there are less, it must be assessed at a higher proportionate value. It was, however, contended that there is a distinction between a canal or navigation and a lock, and that a lock is profitable, because it is supplied with water from the rest of the canal lying in other parishes. This argument, assuming it to be well founded, only proves that a part of the source of profit is derived from the other parishes through which the canal passes, and that consequently a part only of the lock dues ought to be ascribed to those parishes; for the dues are payable as well for the use of the water derived from the Severn as from the canal, and also for the use of the soil and fixed machinery of the locks; and therefore the rule adopted by the sessions, even according to the argument on the part of the respondents, was wrong. We are of opinion, however, that there is no distinction, as to its ratability, between a lock and a portion of a canal or river navigation; and

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(a) 3 B. & A. 112.

(c) 1 M. & R. 20; 7 B. & C. 236.

(b) 2 D. & R. 793; 1 B. & C. 546.

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that whether the subject-matter of the occupation be productive in itself, or rendered productive by something derived from another parish, or by being used in conjunction with property in another parish, no difference is to be made in the mode of rating. Thus, whether the water of a canal be derived from the same parish or another parish, whether conveyed in pipes or carts, or by engines, makes no difference, if the land in which it is placed be thereby rendered more valuable. It makes no difference whether it remains comparatively still as in a canal, or is moving continually as in a river, or occasionally as in a lock; nor does it make any difference that, unless there was a canal in another parish connected with the lock, no profit would be gained. It might as well be contended that the profits of a bridge, which would not arise unless there were approaches to it, or of land rendered more valuable by roads in an adjoining parish, should be rated in part only in the parish in which such bridge or land is situate. The same argument would apply also to a mill. The occupier of a mill is rated in respect of his profits, without considering from whence the water that works the mill comes; if he is obliged to pay a consideration for the use of that water, that may be one of the expenses to be deducted out of the profits made by the mill, but still it would not vary the place where the rate is to be imposed. The order of sessions must therefore be quashed, and the sessions must rate the company according to the annual profit or value which the subject of occupation within the parish produces. That, generally speaking, would be properly estimated at the rent which a tenant would give, he paying poor rates and the expenses of repairs, and the other annual expenses necessary for making the subject of occupation productive; and a further deduction from that rent should be

allowed, where the subject is of a perishable nature, towards the expense of renewing or reproducing it. This is the rule laid down in *Rex v. The Duke of Bridgewater's Trustees* (a), and *Rex v. Tomlinson* (b). The case, therefore, must be referred back to the sessions, to adjust the rate upon this principle.

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Order of Sessions quashed, and case referred back to the Sessions accordingly.

(a) 4 M. & R. 143; 9 B. & C. 68. (b) 4 M. & R. 169; 9 B. & C. 162.

The KING, on the prosecution of the Inhabitants of the Parish of COTTINGHAM, in the County of Northampton, v. Sir RICHARD BROOKE DE CAPEL BROOKE, Bart.

THE defendant appealed against a rate made for the relief of the poor of the parish of Cottingham, in the county of Northampton, for certain saleable underwoods in that parish; and the sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

There are one hundred and forty acres of land, called Lord *Sondes'* Park, within the parish of Cottingham, in respect of which no person is rated. The park is in the occupation of Mr. *Peach*, as tenant to Lord *Sondes*. Evidence was offered, on the part of the appellant, to prove that, at the time the rate was made, this land was profitably occupied, for the purpose of calling upon the Court to quash the rate, on the ground that no person was rated in respect of it. The evidence was objected to on the part of the respondents, as it had not been proved that notice of the appeal had been served

An appeal against a poor rate, on the ground that *A.* is improperly omitted, cannot be heard unless notice of the appeal, and of the ground of it, have been given to *A.*

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on Mr. *Peach* or Lord *Sondes*. The evidence was rejected. The question for the opinion of this Court was, whether or not the evidence ought to have been admitted.

*Denman*, (*Humfrey* and *M<sup>r</sup> Dowell* were with him,) in support of the order of sessions. The sessions were right in refusing to hear the evidence. The 41 *Geo. 3*, c. 23, s. 6, expressly provides that persons appealing against any rate shall give notice not only to the churchwardens or overseers of the poor, but to all other persons interested or concerned in the event of the appeal. (Here the Court stopped him.)

*Miller*, *contra*. The sessions ought to have heard the evidence and tried the appeal. The 17 *Geo. 2*, c. 38, s. 6, provides, that upon all appeals from rates, the justices, where they see cause to give relief, shall amend the rate in such manner only as shall be necessary for giving such relief, without altering the rate with respect to other persons mentioned in it; but if, upon appeal from the whole rate, it shall be found necessary to quash it, then they shall order a new rate to be made. That statute, s. 4, requires notice of appeal to be given to the churchwardens or overseers of the poor only. It was at first thought, with reference to this statute, that whenever an alteration in the rate was necessary by adding the name of a person not mentioned in it, the justices were bound to amend without quashing; *Rex v. Ringwood* (a), *Rex v. Witney* (b); but a contrary opinion has since prevailed, *Rex v. Andover* (c), *Rex v. Darlington* (d). Then the 41 *Geo. 3*, c. 23, s. 6, provides, that the justices shall not upon appeal amend

(a) Cowp. 326.

(c) Cowp. 550.

(b) 5 Burr. 2634; 2 W. Bl. 709. (d) 6 T. R. 468.

a rate, by adding the name of a person improperly omitted, unless notice has been given to that person; but it does not therefore follow that the appeal is not to be heard where such notice has not been given; for such an omission vitiates the rate, and it ought to be quashed. Here it appears that a certain tract of land was ratable, and was not rated. [*Bayley, J.* We cannot tell that it was ratable; the question is, whether the appellant was entitled to go into his case, and prove it ratable.] It is clear that he was, for the purpose of quashing the rate; notice to the occupier is only necessary where the object is to amend the rate. [*Bayley, J.* In *Rex v. Ambleside (a)* it was held, that the proper course in such a case is to amend the rate, and not to quash it.] But in a later case, *Rex v. The Hull Dock Company (b)*, it was held, that in such a case the onus does not lie upon the appellant to give the sessions the means of amending the rate, but that it is the duty of the parish officers to do so. [*Bayley, J.* But you had no right to proceed at all. You were not in a condition to do so. You had given no notice to the parties, who had a right to cross-examine your witnesses, and to be heard for themselves. *Parke, J.* If you are right, you may always in such a case insure the quashing of a rate by omitting to give notice to the parties interested. *Bayley, J.* The present argument is directly against the words of the 41 Geo. 3, c. 23, s. 6.] In *Rex v. Aberavon (c)* this Court confirmed an order of sessions for quashing a rate, for the reason now suggested, although one of the objections to the appeal was, that the parties interested had no notice. [*Bayley, J.* It did not appear there with certainty that the corporation were not the proper persons to be served with notice, and they had notice.] The omission here made the rate bad; there-  
 (a) 16 East, 380. (b) 5 D. & R. 359; 3 B. & C. 516. (c) 5 East, 453.

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fore the sessions should have heard the appeal and quashed the rate; then, when a new rate was made, all the parties to be affected by it would have had notice.

BAYLEY, J.—I am of opinion that the case of *Rex v. Aberavon* (a) is an authority *against* the argument addressed to us on the part of the appellant in this case. There, the notice of appeal was given to the corporation at large, as the parties interested, the ground of appeal being that certain lands, said to be occupied by them, were not rated. It was contended on the other side that they were not the occupiers, but that there was an actual occupation by certain burgesses and widows of burgesses; and the question arose, whether the Court could quash or amend the rate in the absence of notice to them. Lord *Ellenborough* said, “The case is very loosely and inaccurately drawn. We ought to have the right of enjoyment more distinctly stated. It does not appear whether the burgesses who turned stock on the common did so in right of their franchise, or by permission of the corporate body.” The Court were then about to send the case back to the sessions to be restated, in order to see whether the burgesses were the occupiers or not; which must clearly have been upon the principle that the occupiers ought to have had notice of the appeal. But Lord *Ellenborough*, after consideration, said, “I think we may deal with the case as it is. Here is a large tract of property producing profit, which is liable to be rated, and no person is in fact rated for it. This property is stated to belong to the corporation, and it may be doubtful whether the occupation shewn be their occupation or that of individuals. Under such circumstances I cannot say that the sessions have done wrong in quashing the rate.” Prior to the passing

(a) 5 East, 453.

of the 17 *Geo.* 2, c. 38, wherever any person was improperly omitted in a rate, the Court of Quarter Sessions were bound to quash it. That state of the law produced inconveniences, for remedying which that statute was passed, which, however, though it gave the sessions power to amend, made no provision for giving notice to the person whose name was omitted. It being afterwards thought unjust that a party should be affected by having his name inserted in a rate without notice, the statute 41 *Geo.* 3, c. 23, was passed to remedy that evil. The preamble of that statute recites, that by the 17 *Geo.* 2, c. 38, power was given to justices upon appeals from rates, where they should see just cause to give relief, to amend the same in such manner only as should be necessary for giving such relief, without altering such rates with respect to other persons mentioned in the same. But if Mr. *Miller's* argument were to prevail, the sessions would no longer have the option of amending rates; they would in all cases of omission be compellable to quash them, and thus the number of appeals would be doubled. The sixth section of the 41 *Geo.* 3, c. 23, however, is general, and applies equally to all cases, whether of amending or of quashing rates. It provides, in plain unequivocal terms, that if any person shall appeal against any rate, because any other person is omitted to be rated therein, the person so appealing shall give notice of appeal in writing to the other person so interested in the event of such appeal. In the present case, therefore, it is clear that such a notice of appeal was necessary; and that not having been given, I am of opinion that the course pursued by the justices at sessions was right, and that their order must be confirmed.

LITLEDALE, J., and PARKE, J., concurred.

Order of Sessions confirmed.

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## The KING v. The Inhabitants of WITHERLY.

An unsuccessful search for the appointment of overseers for 1802, made in the parish chest, and among the papers of *B.* deceased, who had acted as executor to *A.*, who had acted as overseer in that year, is sufficient *prima facie* evidence of the loss of the appointment, to let in parol evidence of its contents, without producing the probate of the will of *A.* or of *B.*

TWO justices, by their order, removed *Thomas Oxford* and his wife and children from the parish of Witherly to the parish of Hinckley, both in the county of Leicester. On appeal, the sessions quashed the order, subject to the opinion of this Court upon the following case :—

The pauper was bound apprentice to *William Hurst*, in the appellant parish, to the business of a framework-knitter, by indenture bearing date 6th July, 1802, which witnessed, that *Thomas Goodman*, churchwarden of the parish of Hinckley, and *Robert White*, overseer of the poor of the said parish, by and with the consent of two justices, &c., had put and placed the pauper, a poor boy of their parish, aged eleven years or thereabouts, apprentice to *William Hurst*, until he should attain his age of twenty-one years. This indenture was regularly allowed by two justices, and was executed by *Goodman*, *White*, and *Hurst*.

Under this indenture the pauper served five years in the parish of Hinckley. The respondents admitted that the parish chest of Witherly had been searched, and that nothing relating to the appointment of overseers for the year when the indenture was executed, had been found.

The appellants contended that only one overseer had been appointed for Witherly in that year, and in order to dispose of the original appointment of *White*, in conformity with the case of *Rex v. Stoke Golding (a)*, they called one *Fox*, who stated that *White* was dead; that his, the witness's, father was *White's* executor, and was

(a) 1 B. &amp; A. 173.



also dead; that witness's reason for saying his father was executor to *White* was, because he acted as such, and because witness always understood he was left so by the will. To this evidence the respondents objected, but it was admitted by the sessions. The witness also produced a letter from a son of *White*, addressed to witness's father, expressing satisfaction that he was left in trust; which letter was received in evidence subject to the same objection. Witness further stated that he had searched his father's papers in the presence of his mother, who, as witness stated, was his father's executrix, but that he found no appointment of *White* as overseer of *Witherly* among them.

The sessions thought that sufficient search for the appointment had been made, and after hearing parol evidence to prove that only one overseer had, in fact, been appointed for *Witherly* in the year in question, quashed the order for insufficiency in the indenture.

*Humfrey*, in support of the order of sessions. The decision of the sessions was right. All the means of procuring primary evidence had been exhausted, and the secondary evidence, therefore, was admissible. All that was laid down as requisite to be done in *Rex v. Stoke Golding (a)*, was done in the present case. In that case no notice had been given to the overseer, who was living, to produce the appointment; in this case, the overseer being dead, search for the appointment had

(a) There, the indenture had been signed by only one overseer; and it was held, that before parol evidence of there having been only one appointed in that year could be allowed, all the means of procuring the written appointment must be

shewn to have been had recourse to; and that a notice to the appellants to produce all books, papers, &c., was not sufficient, but that the officers themselves should have been subpoenaed. 1 B. & A. 173.

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been made with his executor; and it was admitted that the parish chest of Witherly had been searched for the same purpose in vain. But it will be contended on the other side, that the person with whom search was made was not satisfactorily proved to have been the executor of the overseer. It was proved that he had acted as executor, and that is sufficient in a case like the present. It was further proved that he had possession of the overseer's papers, and that among those papers the search was made. There was, therefore, reasonable presumption that the appointment had been lost, and then parol evidence of its contents became admissible. The letter which was found by the executor among the papers of the deceased was also, under the peculiar circumstances of this case, properly received in evidence, for it went to shew not only that he had acted as executor, but that he had done so with the knowledge and approbation of the relatives of the deceased. Strict proof is not required in cases of this description: *Rex v. Stourbridge (a)*.

*Hildyard*, contra. The sessions have, in effect, found as a fact, that the parishioners of Witherly, contrary both to law and usage, appointed only one overseer for the year in question. So improbable a fact ought to have been proved by strict and positive evidence, which it is admitted it was not in the present case. *Rex v. Stourbridge* was a very different case from this. There the indenture had been entrusted to a person deceased, for the purpose of carrying it to the parish officer, and it was presumed, first, that the messenger had done his duty and delivered the indenture to the parish officer; and secondly, that the indenture, not being to be found in the parish chest, had been lost; both of which were natural and warrantable presumptions. Here, the ap-

(a) 2 M. & R. 43; 8 B. & C. 96.

pointment not being to be found in the parish chest, and the overseer being dead, the executor of the overseer was undoubtedly the proper person with whom to make a search. But there was no proof here that the person whose papers were examined had been the executor of the overseer. None of the overseer's papers were found among those of the supposed executor. [*Bayley, J.* It is possible that he may have left no papers behind him.] The probate ought to have been produced; that is the only legal proof of a man's being executor. [*Littledale, J.* It was proved that he had acted as executor.] There was no fact whatever proved that led to the inference that he had had the actual custody of the papers of the deceased, and there was no regular evidence of his having had the legal custody of them. All the facts that appeared might have applied to an executor de son tort, while there was an executor of legal right existing.

BAYLEY, J.—I do not think the letter was properly received in evidence, but I think enough was done to render the secondary evidence admissible. It was proved that the only overseer who signed the indenture was dead; that a person, who was also dead, had acted as his executor; and that the papers of that person had been searched for the appointment of overseers without effect. It was admitted that the parish chest had been searched, and that no appointment could be found there. For such a purpose as this, strict proof of executorship is not requisite. It is said that the probate ought to have been produced, but the papers of a deceased person may lawfully, and frequently do, pass into the possession of the executor before probate. It is not, therefore, necessary to produce the probate in order to shew that a person acting as executor has the legal custody of the papers of the deceased. I am of opinion that the

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evidence was sufficient, and that the order of sessions is right.

LITLEDAL, J.—I am of the same opinion. There was no proof that any executor existed, but there was proof that a person had acted as executor; and among his papers, he being dead, search for the appointment was made. That was enough to warrant the presumption that that person was the executor, and would have had the custody of the document if it had been in existence.

PARKE, J.—I am also of the same opinion. I think that, for a purpose like this, search among the papers of a person who had acted as executor, was sufficient. Conclusive evidence of the loss of the document was not necessary. There was *prima facie* evidence of it here, and that was sufficient to let in the parol testimony.

Order of Sessions confirmed.

The KING v. The Undertakers of the AIRE and CALDER  
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An act of parliament empowered certain undertakers to make navigable a river, and for that purpose to scour and

cleanse the river and to dig and cut the banks. Another act recited that the legal estate and interest in the navigation of the same river, and in certain lands and buildings, was vested in trustees, whom it empowered to sell and convey in fee the said lands and buildings, and to mortgage in fee the said navigation, and the said lands and buildings:—Held, that neither of these acts vested the soil of the bed of the river in the undertakers, and, therefore, that they were not ratable to the poor as the owners or occupiers of the river.

BY a rate made for the relief of the poor of the township of Brotherton in the West Riding of the county of York, the defendants were assessed in the sum of 150*l.* on a total annual value of 2000*l.*, as occupiers and owners of the cut or canal, *and that part of the River Aire* lying

within the township of Brotherton, dams, locks, weirs, and toll dues or rates. On appeal, the sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

By an act of 10 & 11 *W.* 3, for making and keeping navigable the rivers Aire and Calder, in the county of York, certain persons therein named were empowered, at their own proper costs, to make navigable and passable with barges, boats, lighters, and other vessels, the said rivers Aire and Calder, from Weeland up to the towns of Leeds and Wakefield, and for that purpose to cleanse, scour, open, enlarge or straighten the said rivers or either of them, and to dig or cut the banks of the same, and to make new or larger cuts, trenches, or passages for water in, upon, or through the lands or grounds adjoining or lying contiguous to the said rivers, or either of them, as they should think fit or necessary for the better carrying on and effecting the said undertaking; and to build, erect, set up and make upon the lands adjoining to the said rivers, or either of them, locks, weirs, turnpikes, pens for water, cranes, wharfs and warehouses, where the said undertakers, their heirs or assigns, should think fit. And it was enacted, that for and in consideration of the great expenses which the undertakers, their heirs or assigns, would be at, not only in making the said rivers navigable as aforesaid, but also in repairing and keeping the said rivers navigable and useful for the said navigation, it should be lawful for the said undertakers, their heirs, executors, administrators, and assigns, and no others, from time to time and at all times thereafter, to demand and take from all persons that should send down or receive up any packs or trusses of cloth, or other merchandizes, wares, or commodities whatsoever that should be conveyed up or down the said rivers, or either of them, the rates and

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tolls thereafter mentioned; saving and always reserving unto the corporation of Pontefract, in the county of York, and to all other person and persons, their respective heirs, successors and assigns, all royalties and rights, and privileges of fishing, and other dues and duties, in or upon the said rivers, or either of them.

By an act of 14 *Geo. 3*, for amending the act of 10 & 11 *W. 3*, it was enacted, that it should be lawful for the said undertakers, at all times, at their discretion, to cleause, scour, deepen, enlarge, straighten, contract, and improve, and in a good navigable state to keep and preserve, by all necessary and proper works, ways, and means, as well the said several cuts and canals, and every of them, as also the cuts made under the authority of the said act of *W. 3*, and the channels and courses of the said rivers Aire and Calder, and the beds thereof respectively, not only from the said towns of Leeds and Wakefield to the place called Weeland, but also from Weeland to the conflux or conjunction of the said river Aire with the river Ouzé; and to remove all beds of earth, soil, sand, gravel and stone, and all other obstructions and impediments whatsoever, which anywise obstructed the said navigation, either in haling, sailing, or towing of boats, barges, &c., with men, horses, or otherwise; and also to build and set up, or make, over, across, or in the said cuts, canals and channels or courses of the said rivers Aire and Calder, and upon the lands and grounds adjoining or near unto the same, such and so many bridges, tunnels, culverts, locks, sluices, flood-gates and other gates, pens for water, weirs, jetties, weigh-beams, winches, cranes, engines and other works, as should be thought necessary or convenient for the said navigation.

By s. 110 of the said act, after reciting that the legal estate and interest in the then present navigation of the said rivers, with the works and appurtenances of navi-

gation thereunto belonging, and the tolls and duties by the said former act granted, and divers messuages, mills, warehouses, buildings, lands, tenements and hereditaments, stood vested in Sir *W. Milner, Jeremiah Dixon, Richard Wilson* and *Richard Burton*, and their heirs; that is to say, one full moiety or half part of all the premises to the use and behoof of the said Sir *W. Milner* and *Jeremiah Dixon*, their heirs and assigns, for ever; and the other full moiety or half part of all the premises to the use and behoof of the said *Richard Wilson* and *Richard Burton*, their heirs and assigns, for ever; nevertheless upon trust for themselves and the rest of the undertakers of the said navigation, their heirs and assigns; it was enacted, that all and every the lands and hereditaments to be purchased by the undertakers, their heirs and assigns, or for which any sum or sums of money should be assessed under and by virtue of that act, should, upon payment of the purchase-money for the same, or the sum or sums so to be assessed in satisfaction, be conveyed unto, or otherwise should, together with all the rates, tolls and duties by the now reciting act granted, and the said cuts and canals, and every of them, and all other the works of navigation to be made by virtue of the powers thereof, stand and be vested in the said Sir *W. Milner, Jeremiah Dixon, Richard Wilson*, and *Richard Burton*, their heirs and assigns, for ever, upon the like or the same trusts, and to and for the like uses, intents and purposes, and subject to such or the same conditions, provisoes, restrictions and agreements, in all respects whatsoever, as they the said Sir *W. Milner, J. Dixon, R. Wilson*, and *R. Burton* then stood seised of the said then present navigation, tolls and duties granted by the said former act, and the messuages, mills, warehouses, buildings, lands, tenements and hereditaments aforesaid; and to, for and upon no other use, trust,

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intent, or purpose whatsoever. And by the said act, after reciting that the said undertakers stood indebted in divers sums of money on the account of several purchases by them made or contracted for, of certain messuages, mills, lands and tenements upon or near to the said navigation, and upon other accounts concerning the same; and also reciting that the defending the property of the undertakers, and the obtaining that act, had been, and the making and executing the several proposed cuts, canals and other works for the improvement of the navigation, would be attended with considerable expense, and it might become necessary for the said undertakers to raise money, as well for defraying such debts and expenses, as for making future purchases and improvements in their said navigation; it was enacted, that it should be lawful to and for the trustees in whom the legal estate and interest of the said navigation and premises should be then vested, and they the said trustees, and their heirs, were thereby empowered and directed, by any deed or deeds to be by them executed in the presence of two or more credible witnesses, as well to sell and convey in fee simple such messuages, mills, lands, or tenements, belonging to the said undertakers, their heirs and assigns, as should be directed to be sold and conveyed as aforesaid, as to grant, demise, convey and assure in fee, or for any term or number of years by way of mortgage, as well the said *navigation* and the tolls, rates and duties of the same, as also all or any messuages, mills, lands, tenements and hereditaments, being the undivided property or estate of, or which should thereafter belong to, the undertakers, their heirs or assigns, or any part or parts thereof, as a security for the repayment of all sums of money to be raised or borrowed, unto such person and persons respectively, or his, her, or their trustee or trustees, as should be willing to advance and lend the same.



In pursuance of the powers contained in the said acts of parliament, the undertakers of the navigation of the rivers Aire and Calder have made the said rivers, and still maintain the same navigable and passable in the manner directed by the acts. The river Aire passes through the respondent township. The river navigation in that township is of the length of 5428 yards. In one part of the river in that township there is a weir across the river, and a side cut with locks for the purpose of passing boats and barges from the higher level above to the lower level below the weir. The side cut is of the length of 186 yards, and had been made by the undertakers of the navigation in pursuance of the powers given them for that purpose by the act of W. 3. The undertakers of the navigation of the Aire and Calder had never before been rated to the poor in the township of Brotherton, in respect of the navigation, or of their dams, locks, weirs, or the tolls arising therefrom; but have been for many years, and antecedently to the passing of the act of 14 Geo. 3, rated in respect of the tolls of their navigation in the townships of Leeds and Wakefield. The tolls due in respect of goods carried along the navigable channel in the township of Brotherton amount to the sum at which the appellants are rated, but the proportion due in respect of the passage along that portion of the navigable channel which consists of an artificial cut falls far short of that sum. No tolls are received in the township of Brotherton. The appellants contended that they were not, under the circumstances, liable to be rated for the relief of the poor in the township of Brotherton, in respect of the cut or canal, or that part of the river Aire lying in Brotherton, or the dams, locks and weirs, tolls, dues, or rates, or any of them; or, at least, that they were not ratable in respect of ne part of the river Aire lying in Brotherton, or the tolls,

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dues, or rates; and that the rate was bad, as including conjointly various matters, some of which were clearly not ratable, and for not stating explicitly how much was laid on each subject-matter of assessment. The sessions, however, were of opinion that the appellants were, under the circumstances stated, liable to be rated in respect of the navigable channel; and they confirmed the rate generally, subject to the opinion of this Court upon the whole case.


*J. Williams* and *Archbold*, in support of the order of sessions. The question is, whether this case can be distinguished from those of *Rex v. The Mersey and Irwell Navigation* (a), and *Rex v. The Avon Navigation* (b); in other words, whether the acts of parliament vest the soil of the bed of the river in the undertakers of this navigation, or give them an easement only: because, in the latter case, it must be admitted upon the authorities cited, that they are not ratable to the relief of the poor. Now, the first act of parliament, 9 & 10 W. 3, undoubtedly does not vest the soil of the bed of the river in the undertakers; and if the case rested on that statute only, it could not be contended that the powers given in this case were greater than those given to the Mersey and Irwell Navigation Company, namely, powers of entering for the purpose of making and maintaining the navigation, which have been held to constitute an easement only. But the subsequent statute of 14 Geo. 3, it is submitted, goes further, and does vest the soil in the undertakers. The 110th section recites that the *legal estate and interest* in the (then) present navigation of the said river, with the works and appurtenances of *navigation* thereunto belonging, and the tolls and duties by the

(a) 4 M. & R. 84; 9 B. & C. 95.  
 (b) 4 M. & R. 23; 9 B. & C. 114,  
 per nomen *Rex v. Thomas*.

former act granted, and divers messuages, mills, warehouses, buildings, lands, tenements, and hereditaments, stood vested in certain persons therein named, their heirs and assigns, for ever, upon trust for themselves and the rest of the undertakers. Now the word "navigation" imports the actual soil and bed of the river; not the mere right of using the river for the purpose of passing over it. By another section, the trustees in whom the legal estate and interest in the said navigation and premises should be then vested, were empowered to sell and convey in fee simple the messuages, mills, lands, or tenements belonging to the undertakers, their heirs or assigns; or to convey in fee, or for any number of years, by way of mortgage, as well the said *navigation* and the tolls, as any messuages, &c. being the property of the undertakers, their heirs or assigns, as a security for the repayment of money borrowed. So that the trustees may either sell or mortgage lands or buildings belonging to the undertakers, but they may only mortgage the navigation and the tolls; a distinction which clearly imports that the trustees had the fee in the navigation or bed of the river.

*F. Pollock, Alderson, and Coltman, contra*, were stopped by the Court.

BAYLEY, J.—It seems to me that the present case is not in substance distinguishable from those to which we have been very properly referred, and that the undertakers of this navigation are not liable to be rated for the bed of the river. In order to make them so liable, they must be "occupiers of lands or houses" within the fair meaning of those words in the statute of *Elizabeth*. Now the cases referred to have established as a rule, that where an act of parliament, passed for the purpose

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of making navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them for that purpose a mere privilege of scouring and cleansing it, they are not occupiers of the land used for the navigation, but have a mere easement in it. It is conceded that if this case rested upon the act of 9 & 10 W. 3 alone, it could not be distinguished from the case of *Rex v. The Mersey and Irwell Navigation*; and that if that case was properly decided, the undertakers of the Aire and Calder navigation are not occupiers of land. But it is said that the act of 14 Geo. 3, goes further, and does shew that these undertakers are the owners and occupiers of the bed of the river. The 9 & 10 W. 3 having given the undertakers an incorporeal hereditament, and it clearly did no more, the 110th section of the 14 Geo. 3 recites that the legal estate and interest in the navigation is vested in the trustees. This part of the argument depends entirely upon the meaning of the word "navigation" as there used. If it means only the incorporeal right of cleansing and scouring the bed of the river in order to make it navigable, it does not shew that the trustees are the owners of the bed of the river. As the latter act recites that the trustees have some right, we must refer to the former act to see what that right is. The former act, according to the decision in *Rex v. The Mersey and Irwell Navigation*, gave the undertakers an incorporeal right only. Assuming that to be correct, there is nothing in the latter act to shew that the legislature intended to give them any other right. In the interval between the passing of the two statutes there can be little doubt that the company exercised their power of purchasing lands, and acquired corporeal property in those lands. The 110th section of the 14 Geo. 3 recites, that the legal estate in the navigation, and in the lands and buildings is in the trustees. But that

statute no where vests any thing in them; the former statute alone vests any thing in them: and that gives the undertakers an incorporeal hereditament only in the bed of the river, and a corporeal hereditament in other things, namely, the land and buildings. Then it is said that a subsequent clause empowers the persons having the legal estate and interest in the navigation, as well as the other property, to mortgage in fee the navigation and the tolls, as well as the other property; and that the use of the word *navigation* there shews an intention on the part of the legislature to give the trustees of the navigation power to convey the fee in a corporeal hereditament because else the introduction of the word *navigation* would have been unnecessary, as the mention of the tolls and other property would have been sufficient. But I cannot attach any weight to this argument. The word “navigation,” being used in the act, would enable the trustees, by introducing the same word into a mortgage deed, to give a mortgagee the right of cleansing and scouring the bed of the river, and to make or maintain it navigable, and thereby pass to a mortgagee the legal estate and interest which the trustees had in the incorporeal hereditament. In this view of the whole case, which appears to me the sound one, there is nothing in the act of 14 Geo. 3 to shew that the undertakers of this navigation are, or were ever intended to be, the owners or occupiers of the bed of the river; and it is quite clear that under the act of 9 & 10 W. 3, they acquired no more than an easement in the bed of the river, in respect of which they are not ratable.

LITLEDALE, J. and PARKE, J. concurred.

Order of Sessions quashed, and the rate ordered to be amended by erasing so much of the assessment on the company as relates to the river Aire.

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By the rules of a friendly society, twelve persons were annually chosen as a committee, who were empowered to settle and determine all grievances, differences, and disputes which might arise relative to the affairs of the society, subject to an appeal to two magistrates, by a party grieved; and each member was to pay three shillings annually to the society's medical attendant. The plaintiff who had been duly appointed such attendant, was dismissed by the committee, without any previous notice, and

GARNER v. SHELLEY and two others. (a)

**THIS** was an action of assumpsit. The declaration contained counts for money had and received by the defendants to the plaintiff's use, and for money due upon an account stated between them.

The cause came on for trial before Mr. Justice *Gaselee*, at the last assizes for the county of Stafford, when the jury found a verdict for the plaintiff, damages, 15*l.* 9*s.*, subject to the opinion of the Court upon the following case :—

The plaintiff is a surgeon and apothecary. In the year 1821, a friendly society was established at Yoxall, subject to certain rules, orders, and regulations, which were in due manner allowed, confirmed, and approved by the justices of the peace assembled at the general quarter sessions of the peace for the county of Stafford, held, by adjournment, on the 10th of August, 1822; and the said rules, orders, and regulations, as well as the tables of the society, were, on the same day, deposited with the clerk of the peace, and enrolled at the same

(a) This and the two following of Cases in the Common Pleas cases are taken, by permission, and Exchequer Chamber. from Moore and Payne's Reports

another person appointed in his stead, but against his consent, and without any meeting of the members at large. Disputes having arisen respecting the plaintiff's dismissal, upon an application by the committee to two magistrates, they recommended a general meeting of the society; which was convened accordingly, and a large majority of the members voted for the plaintiff, who sued the stewards of the society for the allowance received from the members for his services subsequently to his dismissal. The jury found, that the committee did not act *bonâ fide* in dismissing the plaintiff:—Held, that, as such dismissal was not a grievance or dispute within the jurisdiction of the committee, the plaintiff was entitled to recover in an action for money had and received; and that the stewards were not bound to pay over the allowance received from the members, to the person appointed in the plaintiff's stead, although the committee ordered them to do so.

sessions. Among the said rules, orders, and regulations, are the following, (that is to say)—

First, That the society was established for the purpose of raising by subscription from the several members thereof, and by voluntary contributions, a stock or fund for their mutual relief and maintenance, in old age, sickness, and infirmity, and for the benefit of the widows and representatives of deceased members, in certain cases, and for no other purposes whatsoever.

Second, That twelve discreet and intelligent persons, members of the society, should be annually chosen as a committee, which committee, or any five of them, including the stewards, or their proxies, should have the power to inquire into, settle, and determine, all grievances, differences and disputes whatsoever, which might or should arise relative to the affairs of the society, save and except that the parties aggrieved might appeal to any two magistrates, as empowered by the acts relating to friendly societies. That the committee, under the control of the high and deputy stewards, should have power to lend and dispose of the society's money at interest, in such way and manner, and in such sums, as they believed to be most advantageous to the society, taking good and proper security for the same. That the old committee should nominate and appoint the persons composing the new one, and six of them at least should be annually changed by ballot. That immediately after the new committee was chosen and formed, they, the said committee, should agree upon and appoint three sufficient, discreet, and intelligent persons, among the twelve composing such committee, to act as stewards, the one as high steward, the other two as deputy stewards, to assist and help him, the said high steward, in the execution of his office. Any person refusing to serve the office of

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Also ordered, that a copy of the following notice be delivered to Mr. *Garner* forthwith:—

“ Sir,—You are hereby informed, that the committee of the Yoxall New Friendly Society having met this day to consider the propriety of continuing you as surgeon to the society, it is agreed that your services shall cease from this day. I remain, for the deputy stewards and committee, your’s, &c. *John Jackson.*”

A copy of such notice was delivered to the plaintiff on the same or on the following day. The proportion of the members’ subscription up to that time was paid to the plaintiff, who did not, however, acquiesce in the dismissal, but had continually from thence attended as many of the members of the society as would permit him to do so; amounting to more than the majority: and seventy-five of them, the whole number being from one hundred to one hundred and ten, signed a paper approving of him as the doctor. It did not appear when the resolution was signed. On the 1st of December, 1827, it had no signatures.

The learned Judge left it to the jury to say, whether the proceedings of the committee were *bonâ fide* for the investigation of the complaints, or merely for the purpose of getting rid of the plaintiff and appointing another medical man in his stead. The jury found the latter, and said that the plaintiff was an injured man.

The plaintiff had been and then was a member of the society.

The defendants, on the 19th of March, 1827, were elected stewards of the society, and continued to act as such till May, 1828; and, in the early part of that year, received from each of the several members of the society, according to the usual course, the sum of three shillings for their respective payments to the society’s doctor,



under the sixteenth rule, for one year, ending on the 19th of March, 1828, which amounted in the whole to 15*l.* 9*s.*

Upon the 11th March, 1828, the following order was made by the committee and entered upon the books of the society:—

“ At a meeting of the stewards and committee of the Yoxall New Friendly Society, held at the Golden Cup Inn, in Yoxall, this 11th day of March, 1828—Ordered, that the sum of 15*l.* 0*s.* be paid to Mr. *Joseph Fernyhough*, surgeon and apothecary to the said society, that sum being the amount due to him for medicines and attendance for and on the sick and lame members thereof, we, the undersigned stewards and committee of the society aforesaid considering the said Mr. *Joseph Fernyhough*, the legally appointed surgeon and apothecary to such society; and we also further ratify and confirm his appointment to the said office, as witness our hands.”

This order was signed by the high steward and ten other members of the society.

Disputes having arisen respecting the aforesaid vote of dismissal of the plaintiff, the committee (including the present defendants), and many members of the society, attended before two of the justices of the peace of the county of Stafford. It was denied, on the part of the defendants, that the magistrates had authority, under the statutes (*a*), to settle the matter themselves, or make any order respecting it; but, upon their recommendation, a public meeting of the society was held on the 17th December, 1827, of which the following notice had been given:—

(*a*) 33 *Geo.* 3, c. 54; 35 *Geo.* 49 *Geo.* 3, c. 125; 59 *Geo.* 3, c. 3, c. 111; 43 *Geo.* 3, c. 111; 128.

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“Yoxall New Friendly Society, Dec. 6, 1827.

“It having been agreed, in pursuance of the recommendation of the magistrates, at their meeting at Wichnor Bridges, on Saturday last, that the votes of the members should be taken at the next club-meeting, to be held on the 17th December instant, for a surgeon to the club, you are requested to attend to give your vote on that occasion.”

The meeting was attended by the present defendants, who were stewards, the rest of the committee, and by a very large majority of the members of the society; and at such meeting fifty-three voted for the plaintiff, eleven were neuter, and three voted for the rival surgeon.

The plaintiff, before the action was brought, demanded the above sum of 15*l.* 9*s.* of the defendants, who refused to pay him, alleging that the committee considered Mr. *Fernyhough* to be the legal doctor.

The question for the opinion of the Court was—

Whether the plaintiff was entitled to recover from the defendants the said sum of 15*l.* 9*s.* above demanded, or any and what part thereof. If the Court should be of opinion that the plaintiff was so entitled, the verdict was to stand for such sum as they should think fit; if not, a nonsuit was to be entered.

The case now came on for argument:—

*Spankie*, Serjt., for the plaintiff. The jury having found that the plaintiff was duly appointed the doctor or medical attendant to the society, on its being established in 1821, it was incumbent on the defendants to have shewn that he was legally dismissed. The rules did not

empower the committee to amove him from his situation, their duties being limited and confined to the care of the funds and finances of the company; for the second-rule only empowers them to dispose of the society's money at interest, and for the old committee to nominate and appoint a new one; but it is altogether silent as to the appointment of a surgeon or any other person or officer than stewards, who were to be appointed by the new committee. Besides, the plaintiff had no notice of the meeting in which the resolution for his dismissal was passed; and, even in the case of a corporation, who have a power to amove a member, such power must be exercised by an assembly duly convened by summons. *The King v. The Mayor of Doncaster* (a). The learned serjeant was proceeding with his argument, when he was stopped by the Court, who called on—

*Russell*, Serjt., for the defendants. If the rules of a friendly society be framed in conformity with the statutes by which it is formed and regulated, there can be no doubt but that the committee may appoint and remove any officer belonging to such society; and here the committee had a power to appoint a doctor or medical attendant; and they had, consequently, an authority to dismiss him without the sanction or concurrence of the society at large. By the second rule, they were empowered to inquire into, settle, and determine, all grievances, differences, and disputes whatsoever, which should arise relative to the affairs of the society. They, therefore, had a right to dismiss the plaintiff, complaints having been made as to his negligence and misconduct, by

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(a) 2 Burr. 738. See also *The King v. The Mayor of Liverpool*, id. 723.

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several of the members, previously to the convening of the meeting at which he was dismissed. But, even if the plaintiff were not properly dismissed, he cannot be entitled to recover as against the defendants in this action, as they were restrained from paying over the money he now seeks to recover, by the order of the committee of the 11th March, 1828; and the defendants were bound to act in obedience to that order. The statute 59 *Geo. 3*, c. 128, s. 9, enacts, "that the rules of every society or institution formed under the authority of that act, shall contain provisions with respect to the powers and duties of the members at large, and of such committees or officers as may be appointed for the management of the affairs of such society, and that such society should not be subject to the provisions and restrictions of the 33 *Geo. 3*, as to the appointment of committees, or otherwise, with respect to the management of such society;" and, here, it appears that the rules were duly confirmed and approved of by the justices at sessions. The committee, therefore, might dismiss the plaintiff, if they thought that the person who was to succeed him would pay more attention to the members of the society; but actual complaints had been made against him. Although it has been said, that he had no notice previously to his dismissal, yet he was sent for after the committee had assembled; and, as the proportion of the members' subscription was paid to him up to that day, and he received it without making any objection, it must be taken to operate as a submission to the act of dismissal. If the plaintiff had felt himself aggrieved, he ought to have made his complaint to two magistrates, under the statute 33 *Geo. 3*, c. 54, s. 15; and, although the committee attended before such justices, yet they declined to act, but delegated their authority to the committee, which they

ought not to have done. But, as *Fernyhough* was appointed to succeed the plaintiff, at the meeting in August, 1826, and the defendants were not elected stewards until the 19th March, 1827, they are liable to pay him; particularly as they were in terms directed to do so by the previous order of the 11th March, and by which *Fernyhough's* appointment was ratified and confirmed. If, therefore, he were to commence an action against the defendants to recover the sum found to be due, and directed by the committee to be paid to him, there could be no legal defence; and the plaintiff now seeks to recover that identical sum.

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BEST, C. J.—I am of opinion that this action is maintainable. In the first place, it does not appear to me that the matter which the committee have taken upon themselves to decide can be considered as a grievance or dispute within the terms of the second rule, or as being within their province to determine. If they intended to prefer a complaint against the plaintiff, he should have had previous notice of it; but it was left to the jury to say, (and properly,) whether the proceedings by the committee were *bonâ fide* for the investigation of the complaints, or merely for the purpose of getting rid of the plaintiff, and appointing another medical man; and they found that it was for the latter purpose only. They have, therefore, found, in effect, that the meeting was convened to dismiss the plaintiff, and appoint another in his stead, who was a friend of some of the influential members. But the parties afterwards attended before two magistrates, who recommended a meeting of the society to be held, which was convened accordingly, and it was decided by a great majority of votes, that the plaintiff should remain; and, as that meeting was attended by the defendants and the rest of the committee, it must be

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taken that they acquiesced in the recommendation of the magistrates, and that the plaintiff's rights were then restored to him. Although it has been said, that if the defendants pay to the plaintiff the sum sought to be recovered by him in this action, they will be liable to pay a like sum to *Fernyhough*; yet, if they pay him, they will do so in their own wrong, as I am clearly of opinion, that, under the circumstances, the plaintiff is entitled to recover.

PARK, J.—I am of the same opinion. It appears that the society was established for the purpose of raising a fund for the relief and maintenance of the members in old age, sickness, and infirmity, and ten times the amount of the sum which the plaintiff seeks to recover has been expended out of the funds in the defence of this action.

BURROUGH, J.—I think there should have been a summons, appearance, and hearing, previously to the dismissal of the plaintiff; and it does not appear by the case that it was at all authorised.

GASELEE, J. concurred.

Postea to the plaintiff.



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*WILDE*, Serjt., on a former day in this Term, obtained a rule *nisi*, that a writ of privilege might issue, to exempt the applicant, Mr. *Jefferies*, the deputy to the clerk of the treasury of this Court, from serving the office of overseer of the poor of the parish of St. *Giles*. The learned Serjeant founded his motion on an affidavit of the applicant, which stated, that he had filled the situation of deputy to the clerk of the treasury of this Court since the year 1812; that the duties of the office required his personal attendance during Term and at the Sittings, from eleven in the morning until two in the afternoon, and from six to eight in the evening; and that he was entrusted with the custody of the records of the Court, which he filed and kept in proper order, and which he was obliged to produce to parties applying to inspect them, and for which he was entitled to a fee or remuneration; that he had offered to serve the office of overseer by deputy, or to pay the usual fine imposed on a parishioner of St. *Giles*, who is appointed to fill that office.

A writ of privilege granted to exempt the deputy to the clerk of the treasury of the Court of C. P. from serving the office of overseer.

*Merewether*, Serjt., afterwards shewed cause. The privilege of the Court extends only to exempt its officers from *personal* duties. The question then is, whether personal attendance was requisite in both the offices which Mr. *Jefferies* was called upon to fill. In *Gerard's* case (*a*), it was held, that an attorney is not privileged from serving in the militia, or providing a substitute; and although Mr. Justice *Blackstone* there said, that privilege extends to all cases of personal service, as in the case of overseers of the poor, and he referred to the *Officina Brevium* (*b*) as an authority; yet, he observed,

(a) 2 Sir W. Bl. 1123.

(b) P. 162.

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that there was no pretence for privilege, if it were not a personal service. Although in the case of *The King v. Clerke*, Mr. Justice Grose said (a)—“That the office of constable might be served by deputy;”—yet the office of overseer of the poor cannot. But the office of deputy to the clerk of the treasury might, as the duties of the office did not require *his personal* attendance; and even if they did, he might procure a deputy. Although, in the case of *The King v. Warner* (b), it was decided, that an officer of the customs was exempt from serving the office of overseer of the poor, although he had not his writ of privilege at the time; yet there the offices were incompatible, and, having obtained his writ of privilege, the Court at once admitted that it exempted him from serving the office. Besides, the office of clerk of the treasury is not a patent office. He holds his place by the parol appointment of the Lord Chief Justice; and, although it is his duty to take care of and file all the records of the Court, yet his personal attendance is not necessary for that purpose, and the applicant should have at least shewn the Court that his office could not have been performed by deputy. A writ of privilege has never been extended to an officer of the Court, who fills the place of deputy. An attorney stands in a different situation, as he is entitled to his privilege, not only as an immediate officer of the Court, but it is his duty to attend personally, and watch the progress of a cause, in which his client not only requires his professional skill and assistance, but his presence in Court is necessary. In *March's Reports* (c), a clerk of the Court residing in *London* was chosen churchwarden, and prayed a writ of privilege, which was granted; and the whole Court agreed, that, for all offices which require personal and continual attendance, as churchwarden, constable,

(a) 1 T. R. 689. (b) 8 T. R. 375. (c) P. 30.



and the like, he may have his privilege; but for offices which may be executed by deputy, and do not require attendance, as recorder and the like, for these he shall not have his privilege. Here, therefore, the applicant should have shewn, either that the offices of clerk of the treasury and overseer of the poor were incompatible, or that the duties of the former office could not be performed by a deputy. In *Bishop v. Lloyd (a)*, a writ of privilege was refused to the chief accountant to the commissioners for victualling the navy, who was chosen churchwarden, as there was no absolute incompatibility in the two offices. Besides, the duty of an overseer is paramount to that of a deputy or inferior officer of the Court, the former being created by statute, and on whom an imperative duty is cast. The writ, therefore, ought not to go.

*Wilde*, Serjt., in support of the application. The office of deputy to the clerk of the treasury of this Court is an office of considerable importance. He has not only the care and custody of the treasury of the Court, which contains all the records, but he examines and signs all copies taken from the rolls, and all records of *Nisi Prius*. He also amends records, and exemplifies verdicts and judgments. It is therefore an office which requires great care and attention, and there are fixed and stated hours of attendance; and the Court must assume that *personal* attendance is necessary; and if so, they will take judicial notice of the duties of their officer, and afford him the protection he seeks. It has been admitted, that an attorney is privileged, although he is not actually bound to attend the Court; whilst here it is sworn that the personal attendance of the officer is necessary. In the *Mayor of Norwich v. Berry (b)*, an

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(a) Bunbury, 255. (b) 4 Burr. 2109; 1 Sir W. Bl. 636.

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For the purposes above mentioned attendance is given at the chambers of the Lord Chief Justice during the Term, and during the Sittings at Nisi Prius for London and Middlesex; and also, during the Sittings after the Summer Assizes are over, attendance is given for a few days before Michaelmas Term, and, after the Christmas vacation, for a few days before Hilary Term. The hours of attendance are from eleven in the morning until two in the afternoon, and from five till eight in the evening.

It therefore appears, that the deputy to the clerk of the treasury is bound to attend personally in the discharge of his duties, each day successively, for a certain portion of the year. The ground on which an attorney is entitled to his privilege is laid down by Lord *Mansfield* and Mr. Justice *Yates*, in *The Mayor of Norwich v. Berry*, viz. that the privilege is the privilege of the Court; that it must have ministers, and that an attorney is exempt from all offices incompatible with his attendance in the Court in which he practises. That he is bound to attend the Court; and, therefore, that he is not within the terms of a bye-law, which made his attendance requisite in another place, for that he could not be necessarily attendant in both places at the same time. So, here, the deputy to the clerk of the treasury is bound to attend personally, in discharge of the duties imposed on him by the Court, and which are for the benefit of the public at large. The *Officina Brevium* is a book of great authority, and contains several precedents of writs of privilege for different officers of the Court. The first is to exempt a clerk of the prothonotary from serving the office of constable (a). There is another to exempt the clerk of the chirographer from executing the office of overseer of the poor (b); another to exempt the clerk of the exigents from the collectorship of tithes (c); and another, directed

(a) P. 160.

(b) Ibid. 162.

(c) Ibid. 163.

to the mayor and aldermen of London, to exempt the treasurer of the Court of King's Bench from being chosen a constable; and the writ states (a), that he was the treasurer of the Bench, where the records are kept; and that his continual residence in Court was required, for the public advantage and utility (b). And although it may be said, that the office of overseer of the poor may be executed by deputy, we are strongly inclined to think that it cannot. But it is unnecessary to determine that point, as the clerk of the treasury and his deputy are exempt from serving the office on the grounds I have stated. In the case of *The King v. Warner* (c), an officer of the customs was held to be exempted from serving the office of overseer, although he had not his writ of privilege at the time he was appointed; and Mr. Justice Grose thought that the two offices were incompatible. In *Stone's* case (d), a writ of privilege was granted to an attorney to exempt him from being reeve to the lord of a manor, he being a copyholder, and liable to serve by custom; and, although it was said, that he might execute the office by deputy, yet the Court held, that the privilege of the Court was as ancient as the custom of any manor, and that he was responsible for his deputy. Looking, therefore, at the nature of the office of the deputy to the clerk of the treasury, and the duties required of him, as well as the authorities to which I have referred, we are of opinion, that the writ of privilege ought to go. This rule, therefore, must be made

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(a) P. 163.

(b) The words in the writ are as follow:—viz. "*A. W. curiam habentem Domus Thesaurarii nostri de Banco predicto, ubi recorda nostra in eodem Banco conservan-*

*tur, cujus continua residentia in curia nostra, pro nostro et ligearum nostrorum commodo et utilitate, requiritur.*"

(c) 8 T. R. 375.

(d) 1 Lev. 265.

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DOBSON v. FUSSEY and ROBINSON (a).

Trespass for an assault. Plea, that defendants were overseers of the poor, and that a select vestry of the parish *was duly assembled*, at which defendants, as overseers, were present; that plaintiff unlawfully entered and defendants expelled him.

Proof, that one of the members constituting the select vestry, had not been summoned to the meeting:—

Held, that the plea was not proved, as the meeting was not a legally constituted vestry, so as to support the allegation, that the select vestry was *duly assembled*.

**THIS** was an action of trespass, for assaulting the plaintiff, and turning him out of a school-room. The defendants pleaded, first, the general issue; secondly, that before the committing the supposed trespasses, to wit, on &c., at &c., the inhabitants of the parish of Sproatley, then in vestry assembled, did duly and according to the form of the statute in such case made and provided, establish a select vestry for the concerns of the poor of the said parish, and to that end did then and there duly nominate and elect in the same vestry such and so many substantial householders and occupiers within the said parish, not exceeding the number of twenty, nor less than five, as were in such vestry thought fit to be members of the said select vestry, to wit, *Thomas Dibbs, Edward Barber, Robert Fussey, George Caley, and John Williamson*; that afterwards, and before the committing the supposed trespasses, to wit, on &c., at &c., the said persons so nominated and elected as aforesaid were duly appointed by writing, according to the said act, under the hand and seal of one *Christopher Sykes*, clerk, he the said *Christopher Sykes* then and there being one of his Majesty's justices of the peace in and for the county of York; that the defendants, before and at the time when &c., were overseers of the poor of the said parish of Sproatley, and that afterwards, and before the time when &c., to wit, on &c., *a select vestry of the said parish was duly assembled* and holden in a certain convenient place within the said parish, to wit, in a certain school-room within the said parish, touching the care and management of the concerns of the poor of the said parish, according to the said act, at which select vestry

(a) This case was not decided till Hilary term 1831, but it was thought expedient to insert it here.

the defendants, as overseers of the poor of the said parish, were present; that just before the time when &c., and whilst the said select vestry was duly holden and sitting in the said school-room on parochial business as aforesaid, to wit, on &c., the plaintiff unlawfully entered and came into the said school-room, and then and there made a great noise and disturbance therein, and stayed and remained therein making such noise, without the leave or licence, and against the will of the said select vestry so assembled as aforesaid, and thereby then and there greatly disturbed and disquieted the defendants and the other persons then and there composing the said select vestry as aforesaid; and thereupon the defendants, being such overseers, and two of the select vestry so assembled as aforesaid, then and there requested the plaintiff to cease from making his said noise and disturbance, and to go and depart from and out of the said school-room, which the plaintiff then and there wholly refused to do; whereupon the defendants, to prevent such interruption as aforesaid, and to force and compel the plaintiff to quit and leave the said school-room, at the said time when &c., gently laid their hands upon the plaintiff, in order to remove and did attempt to remove the plaintiff from and out of the said school-room; and thereupon the plaintiff then and there forcibly and violently resisted the defendants, and then and there unlawfully attempted to stay and remain in the said school-room; and it then and there became and was necessary to use force and violence for the purpose of removing the plaintiff from and out of the said school-room; and thereupon the defendants did then and there seize and lay hold of the plaintiff by the collar of his coat, and pulled and dragged about the plaintiff, and gave and struck the plaintiff the blows and strokes in the declaration mentioned, and forced, pushed, pulled, dragged, and drove the plaintiff from and out of the said school-room in the said school-

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house or building, and necessarily and unavoidably gave the plaintiff the other blows and strokes in the declaration mentioned, as it was lawful for them to do for the cause aforesaid, doing no unnecessary damage or injury to the plaintiff on that occasion.

Thirdly, that the defendants and divers other persons composing part of the said select vestry of the said parish, before and at the said time when &c., were lawfully possessed of a certain school-room, part and parcel of the said school-room or building in the declaration mentioned; and being so possessed thereof, the plaintiff, just before the time when &c., to wit, on &c., was unlawfully in the said school-room, and with force and arms making a great noise and disturbance there, and at the said time when &c. staid and continued there, making such noise and disturbance, without the leave or license and against the will of the defendants and divers other persons composing part of the said select vestry as aforesaid, and then and there greatly disturbed and disquieted the defendants and the said other persons in the peaceable and quiet possession and enjoyment of the said school-room; and thereupon the defendants then and there requested the plaintiff to cease making his said noise and disturbance, and to go and depart from and out of the said school-room, which the plaintiff then and there wholly refused to do; whereupon the defendants, in defence of the possession of the said school-room, and to force and compel the plaintiff to quit and leave the said school-room, at the same time when &c. in the said declaration mentioned, gently laid hands upon the plaintiff, &c. &c.

The plaintiff added a similiter to the plea of the general issue, and replied *de injuriâ* to the second and third pleas, on which issue was joined.

At the trial, before Lord Chief Justice *Tindal*, at the last assizes at York, it appeared that the defendants were the overseers of the poor of the parish of Sproatley, and that they, with the vestry-men named in the second plea, with the exception of *Thomas Dibbs*, were assembled at a meeting in the parish school-room, on the evening of Saturday, the 22d May, 1830, for the purpose of one of the out-going overseers paying over moneys, then in his hands, to the succeeding overseers; that the plaintiff, not being a select vestry-man, came into the room with two other persons, when he was turned out by the defendants. The clerk to the select vestry was called as a witness, who stated, that he had not summoned *Dibbs*, or given him any notice to attend at the meeting, although he had given notice to the other four persons named in the plea. It further appeared, that the usual days of meeting were Wednesdays.

Under these circumstances, his lordship thought that the defendants had not made out or proved the allegation in the second plea, that a select vestry of the parish was *duly assembled*, as *Dibbs* had received no notice of the meeting, which was a special meeting, and held for a particular purpose, and not convened on one of the general or usual days. The jury accordingly found a verdict for the plaintiff, damages one shilling, leave being reserved to the defendants to move to set it aside and enter a nonsuit, or that a new trial might be had, in case the Court should be of opinion that either of the special pleas could be supported by the evidence adduced at the trial.

*Jones*, Serjt., in the last term, obtained a rule nisi accordingly. Against which—

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*Wilde*, Serjt., was now about to shew cause, when the Court called on—

*Jones*, Serjt., to support his rule. The first section of the statute 59 *Geo.* 3, c. 12, by which select vestries were first constituted, and are now regulated, enacts, that any three substantial householders or occupiers within a parish, having been first appointed by a magistrate, shall be a quorum, and constitute a select vestry for the care and management of the concerns of the poor; and as the defendants proved that four of the select vestry-men named in the second plea had received notice to attend the meeting in question, it was sufficient to shew that the vestry was duly assembled, particularly as against the plaintiff, who was a wrong-doer and an intruder, he not being a member of the vestry. The members who attended at the meeting acted as vestry-men. The meeting cannot be assimilated to a meeting convened for the election of a corporate officer, in which case it is necessary to give notice to all the members of the corporate body; because, here, the meeting was held for the sole purpose of one overseer paying over monies in his hands to his successors in office; and, although the 4th section of the statute 59 *Geo.* 3 provides, that the churchwardens and overseers of the poor must cause ten days' notice to be publicly given, in the usual manner, of every vestry to be holden for the purpose of establishing any select vestry, or of nominating and electing the members, and of every vestry to be holden for the purpose of receiving the report of the select vestry; yet such notice cannot be required where a meeting is convened for a trivial purpose, neither is it necessary to summon or give all the members notice to attend such a meeting. Where, therefore, a notice is necessary, the statute has



prescribed it: and as three vestry-men form a quorum when lawfully assembled, it is not necessary that five should have been summoned or have had previous notice of the meeting. If the officer, whose duty it is to summon the members, should die shortly after a meeting, and it could not be shewn that the members who attended had been summoned, it would not invalidate the meeting, provided three members were present, and acted as vestry-men. But if the defendants, under their first special plea, were bound to shew that the vestry was duly assembled, in order to support that allegation; yet they adduced sufficient evidence to support the last plea, as it does not refer to the foregoing plea, and merely alleges that the defendants and divers other persons composing part of the select vestry were lawfully possessed of the school-room, and not that the vestry was duly assembled in that room. In order to constitute a select vestry, it is sufficient if a certain number of the body of the vestry-men are present; and it is not necessary to consider the precise nature of the meeting, or that they were duly assembled; if they were present and acted as vestry-men, it is sufficient; and it is quite clear that the defendants, and the four other vestry-men who were present at the meeting were acting in their character of vestry-men at the time of the intrusion and interruption by the plaintiff.

TINDAL, C. J.—The question on the first special plea is, whether, from the evidence given at the trial, the defendants made out the allegation that there was a select vestry duly assembled. The introduction of select vestries is of recent date, as they were first established by the statute 59 Geo. 3, c. 12, the 1st section of which enacts “that it shall be lawful for the inhabitants of any

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parish in vestry assembled, and they are thereby empowered, to establish a select vestry for the concerns of the poor of such parish; and to that end, to nominate and elect, in the same or in any subsequent vestry, or any adjournment thereof respectively, such and so many substantial householders or occupiers within such parish, not exceeding the number of twenty, nor less than five, as shall in any such vestry be thought fit to be members of the select vestry; and the rector, vicar, or other minister of the parish, and in his absence the curate thereof (such curate being resident in and charged to the poor's rates of such parish), and the churchwardens and overseers of the poor for the time being, together with the inhabitants who shall be nominated and elected as aforesaid, (such inhabitants being first thereto appointed by writing under the hand and seal of one of his Majesty's justices of the peace, which appointment he is thereby authorised and required to make), shall be and constitute a select vestry for the care and management of the concerns of the poor of such parish; and any three of them (two of whom shall neither be churchwardens nor overseers of the poor), shall be a quorum; and every such select vestry shall continue and be empowered to act from the time of the appointment thereof until fourteen days after the next annual appointment of overseers of the poor of the parish shall take place, and may be from year to year, and in every future year, renewed in the manner thereinbefore directed; and every such select vestry *shall meet* once in every fourteen days, and oftener if it shall be found necessary, in the parish church, or in some other convenient place within the parish; and every such select vestry is thereby empowered and required to examine into the state and condition of the poor of the parish, and to inquire into and determine upon the

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proper objects of relief, and the nature and amount of the relief to be given." The question then is, what is to bring the members of the select vestry together? In order to ascertain this, we should look at the regulations of general or parish vestries. Now, the mode of collecting vestry-men, or bringing them together at a general vestry, is regulated by the statute 58 *Geo. 3*, c. 69, the 1st section of which enacts, "that no vestry or meeting of the inhabitants in vestry, of or for any parish, shall be holden, until public notice shall have been given of such vestry, and of the place and hour of holding the same, and the special purpose thereof, three days at the least before the day to be appointed for holding such vestry, by the publication of such notice in the parish church or chapel, on some *Sunday*, during or immediately after divine service, and by affixing the same, fairly written or printed, on the principal door of such church or chapel." Although no precise mode is there pointed out as to the assembling of the vestry-men, and the regulations of general vestries may not of necessity be applicable to select vestries; yet, as the one bears an analogy to the other, it affords a strong reason for assuming that some formal mode must be pursued to bring select vestry-men legally together. Here, if five of the members composing the select vestry had fixed to meet on a particular day, it might perhaps have been sufficient without further notice. So, if they had met and adjourned to a given day, it might have dispensed with a notice for them to meet on the adjournment-day. But the meeting was called for a special purpose, and on an unusual day; and we have been called upon to say that the meeting was legally convened, although one of the five vestry-men named in the plea had received no notice that it would take place. But such a decision would lead to great mischief and inconvenience; for, as the statute enacts

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that any three shall be a quorum, they might meet to the exclusion of the remaining seventeen, and adopt regulations which the majority would not have assented to or acquiesced in. By analogy to the rules which prevail in summoning the members of a corporation, we cannot say that the meeting in question was a legally constituted select vestry, or that such vestry was duly assembled. But it has been said, that the third plea does not allude to the vestry so assembled; but it refers, without any qualification, to the said select vestry in the second plea mentioned, and virtually incorporates it, as it commences by stating that the defendants and divers other persons, composing part of the said select vestry, before and at the said time when; &c., were lawfully possessed of the school-room in the declaration mentioned. If the defendants did not shew that they had an exclusive right to the room, they were out of Court; for unless the nature of the meeting entitled them to exclude the plaintiff, there is nothing to shew that he was a wrongful intruder. I am therefore of opinion, that neither of the pleas was made out by the proof given at the trial, and consequently that this rule must be discharged.

PARK, J.—On looking at the first special plea, I entertain no doubt whatever; for the defendants there alleged that a select vestry of the parish was *duly assembled*, and it appears that one of the five vestry-men named in the plea had no notice of the meeting. Besides, the meeting was not called on the usual day. That, in my opinion, makes the case still stronger against the defendants. If they selected an unusual day of meeting for a special purpose, it is impossible to say that they were duly assembled, unless notice of the meeting had been given to all the five members named in the plea. To hold otherwise would be highly dangerous, as it might tend to

great mischief; for, if three individuals, who might form a quorum, agreed to meet on a given day without giving any notice to the five or the twenty vestry-men who might constitute the vestry when duly assembled, it would be a great hardship that those latter individuals should be bound by the acts of the three. As to the last special plea, I fully concur with my Lord Chief Justice, as it refers to and in fact incorporates the allegations contained in the second. I therefore think that the verdict for the plaintiff ought not to be disturbed.

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BOSANQUET, J.—I am of the same opinion. The question on the first special plea is, whether the allegation, that a select vestry of the parish was duly assembled, was made out by the defendants at the trial. It appears that the meeting was not held on the regular or usual, but on a particular day, and for a special purpose. The defendants, therefore, should have proved a summons or notice to the five persons named in the plea, to attend the meeting, without which they could not have been legally or duly assembled as a select vestry. The form of the notice is another question, but it is sufficient to say that some notice was necessary; and it is admitted that one of the five members, who is alleged to have constituted the select vestry, received no notice whatever. With respect to the last special plea, as it refers at the commencement to *the said select vestry*, it must be taken to mean the vestry as described in the first special plea, and to incorporate the one with the other, for the words “at the said time when” &c., must of necessity be taken to refer to the vestry alleged in the former plea to be duly assembled. Unless the defendants and other members present were acting in the character of vestry-men legally assembled, they were not authorised in turning the plaintiff out of the room. We are not bound

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to look at the particular purpose for which they met, because all we have to consider is, whether there was a select vestry duly or legally assembled at the time of the plaintiff's expulsion.

ALDERSON, J.—I am of the same opinion. The defendants have precluded themselves by the allegation in their first special plea, as they did not prove that the select vestry was duly assembled; and, in order to justify their turning the plaintiff out of the room as stated in the third plea, they should have shewn that the vestry was legally and duly constituted. The room was a parish school-room, into which the plaintiff might have had as much right to enter as the defendants; and unless they shewed that all the five members named in the second plea had been either summoned or had some notice to attend, they failed to prove that the meeting was duly assembled. Besides, it was called for a special purpose, and not on the usual day of meeting; and it might lead to great inconvenience if three of the members, who would constitute a quorum, might form resolutions behind the back of the majority, who, if they had been present, or had any previous notice of the meeting, might have attended for the purpose of opposing such resolutions. This rule, therefore, must be—

Discharged.



## HANWAY v. BOULTBEE and MARY his Wife. (a)

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**TRESPASS.** The first count of the declaration stated, that the defendant, *Mary*, being the wife of the other defendant, on the 12th day of October, 1829, seized and laid hold of the plaintiff, and forced and compelled him to go along a certain public highway, to the dwelling-house of a certain magistrate, and then and there imprisoned him &c. for the space of six hours. The second count stated that the defendant *Mary*, then and still being the wife of the other defendant, assaulted the plaintiff. The third count stated, that the defendant *Mary*, then and still being the wife of the other defendant, seized and took a certain pack, and certain goods of the plaintiff, (enumerating them). Pleas—First, the general issue; second, a justification under the stat. 7 & 8 Geo. 4, c. 30(b). Replication—

False imprisonment. *A.*, a hawker, went to the house of *B.* to sell goods, and a dog of *B.* coming out of the house, *A.* knocked out one of its eyes, for which *B.*'s wife caused *A.* to be apprehended:—Held, that it was for the jury to say, whether *A.* had struck the dog for his own preservation, and fairly to protect himself; or whether it was a wilful and malicious trespass on his part. To justify the apprehension of an offender under the malicious injuries act, 7 & 8 Geo. 4, c. 30, the offender must be taken in the fact or on a quick pursuit.

(a) This and the following *Nisi Prius* Cases are taken, by permission, from *Carrington and Payne's Reports*, Trinity Term to Michaelmas Term, 1830.

(b) As a plea framed under this act is not to be found in any of the printed collections, a copy of it may be acceptable.

*Plea.*—And for a further plea in this behalf as to making an assault upon the said plaintiff, and seizing and laying hold of the said plaintiff, and forcing and compelling the said plaintiff to go from and out of a certain dwelling-house of the said defendant *Richard Moore Boulton*, into a certain public highway, and in and along divers public highways, to the dwelling-house of the said magistrate, in the said declaration mentioned,

and on that occasion imprisoning and keeping and detaining the said plaintiff in prison for a certain small space of time, part of the said time in the said declaration mentioned, the said defendants, by leave of the Court here for that purpose first had and obtained, according to the form of the statute in that case made and provided, say, that the said plaintiff ought not to have or maintain his aforesaid action against them the said defendants, because they say, that the said plaintiff heretofore, to wit, at the said time when, &c., to wit, in the county aforesaid, wilfully committed damage and injury to and upon certain personal property of the said defendant *Richard Moore Boulton*, to wit, to and upon a certain dog of the

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That the defendant *Mary*, of her own wrong, committed the trespass attempted to be justified.

It appeared that the plaintiff, being a hawker and ped-

said *Richard Moore Boultee*, of great value, to wit, of the value of 2*l.*, that is to say, by then and there wilfully beating and wounding the said dog, with a certain large stick or club, and thereby knocking and beating out one of its eyes, whereby the said dog became and was greatly injured and damaged, and rendered of much less value to the said *Richard Moore Boultee*, the said plaintiff not then and there acting as aforesaid under a fair or reasonable supposition that he had a right to do the act aforesaid, and the said trespass not being committed in hunting, fishing, or in the pursuit of game, contrary to the form of the statute in that case made and provided. And the said defendants further say, that the said plaintiff was then and there, at the said time when, &c., found committing the said offence against the said statute, whereupon the said defendant *Mary*, then and there being the wife and servant of the said other defendant, at the said time when, &c., did immediately apprehend the said plaintiff, and take him before a neighbouring justice of the peace, to wit, before the said magistrate in the said declaration mentioned, the same being then and there a justice of the peace in and for the county and place wherein the said offence was so committed, to be dealt with according to

the law; and, in so doing, the said *Mary* did necessarily seize and lay hold of, and cause the said plaintiff to be seized and laid hold of, and did necessarily compel and force him to go from and out of the said dwelling-house of the said *Richard Moore Boultee*, into the said highway, and in and along the same, and the said other highways, to the dwelling-house of the said magistrate as aforesaid; and the said *Mary* did then and there, as such wife and servant as aforesaid, give information and make complaint to the said magistrate against the said plaintiff, for the offence aforesaid, and so the said plaintiff, for the offence aforesaid, the said *Mary* did necessarily imprison, and keep and detain the said plaintiff in prison, for a certain small space of time, to wit, for the space of one quarter of an hour, while she the said *Mary* was taking the said plaintiff to the said dwelling-house of the said magistrate as aforesaid, and so giving such information, and making such complaint as aforesaid, as it was lawful for her to do for the cause aforesaid, which are the same supposed trespasses in the introductory part of this plea mentioned; and whereof the said plaintiff hath above complained against her. And this the said defendants are ready to verify, &c.



lar, went in the way of his business with his pack of goods to the house of Mr. *Boulbee*, and that a Scotch terrier dog of Mr. *Boulbee* came out of the house and ran at the plaintiff, who with a stick gave the dog a blow which knocked out one of its eyes. The plaintiff then went away, and Mrs. *Boulbee* immediately sent a boy to fetch a constable. The boy returned with the constable, and Mrs. *Boulbee* directed them to go after the plaintiff, and apprehend him for the injury done to the dog. The constable and boy went in pursuit of the plaintiff, and overtook him at a distance of about a mile from Mr. *Boulbee's* house. The constable took him to Mr. *Boulbee's*, and took his pack from him, Mrs. *B.* desiring the constable to put the pack in a room there, which was done. The plaintiff was taken before a magistrate, and was afterwards allowed to depart.

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TINDAL, C. J. (in summing up).—To authorise the imprisonment of the plaintiff, under the act of parliament 7 & 8 Geo. 4, c. 30(a), the plaintiff must have

(a) By the stat. 7 & 8 Geo. 4, c. 30, s. 24, any person who shall wilfully or maliciously commit any damage, injury, or spoil to or upon any *real* or *personal property*, may be compelled by a magistrate to pay a reasonable compensation; and, if he does not, may be committed. See this sect. Carr. Supp. 353. With respect to the question whether dogs are *personal property*, see the case of *Ireland v. Higgins*, Cro. Eliz. 125, where a plaintiff recovered in trover for a greyhound. In that case there is another case cited, where a person was held to be justified in committing an assault, to keep possession of his dog.

By sect. 28 of this statute it is enacted—"That any person *found committing* any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended, without a warrant, by any peace officer, or the owner of the property injured, or his servant, or any person authorised by him, and forthwith taken before some neighbouring justice of the peace, to be dealt with according to law."

By sect. 41 of this act, defendants are entitled to notice of action, and may plead the general issue, &c. See this section, Carr. Supp. 350.

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committed either a wilful or a malicious injury. The first question is, whether this was a wilful injury to the dog. It does not appear that the dog was of a description to be dangerous, or that it was at all necessary that the plaintiff should have struck it. You will therefore say, whether the plaintiff struck this dog for his own preservation, and fairly to protect himself, or whether it was a wilful and malicious trespass on his part. There is also, besides this, another question. It is necessary, under this act of parliament, that the party apprehended should be taken in the fact, or else in quick pursuit (a). In this case, a boy is sent for a constable, and they, having received their directions from Mrs. *Boulton*, are sent in pursuit of the plaintiff, and find him a mile off. You will therefore say whether this was or was not an apprehension on a quick pursuit. With respect to that part of the case that regards the pack, the question will be, whether the plaintiff left his pack as a voluntary deposit, or whether it was taken by order of Mrs. *Boulton*. For, this being a joint action against husband and wife, it is essential that it should have been done by Mrs. *Boulton* (b).

Verdict for the plaintiff—Damages, 10*l.* (c)

(a) See the case of *Rex v. Curran*, 3 C. & P. 397.

(b) In Com. Dig. tit. *Trespass*, (C. 1), it is laid down, that trespass lies "against all who procure or command it, [4 Inst. 317], or against him who afterwards assents to a trespass done for his use or benefit, though not privy at the time of doing it.

[Ib.] So, if he assents to the act of his servant in seizing goods, he will be a trespasser for misusing the goods in seizure, though not privy to the misusage. [Lane, 90]." See also *Butler v. Turley*, 2 C. & P. 585.

(c) Counsel for the plaintiff, *Taddy*, Serjt., and *Tomlinson*; for the defendant, *Wilde*, Serjt.

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## REX v. JOSEPH PERKINS.

**LARCENY.** The offence was stated in the indictment to have been committed "at the parish of Hales Owen, in the county of Worcester." It appeared that the parish of Hales Owen was situate partly in Worcestershire and partly in Shropshire.

If a parish be partly situate in the county of *W.* and partly in the county of *S.*, it is sufficient, in an indictment for *larceny*, to state the offence to have been committed "at the parish of *H.* in the county of *W.*"

*F. V. Lee*, for the prisoner. I submit that this is badly laid. This ought to have been laid as "in that part of the parish of Hales Owen, which is situate in the county of Worcester." There is, in point of fact, no such parish as the parish of Hales Owen, in the county of *Worcester*; and it has been held by Mr. Justice *Gaselee*, that even since the stat. 7 *Geo.* 4, c. 64, s. 20, it is necessary that the offence should be laid to have been committed in some parish in the county, even in cases not local; and there is no such parish as that stated.

*J. Jervis*, *amicus curiæ*, stated, that this very objection had been over-ruled by Mr. Justice *Littledale* with respect to this very parish.

**PARK, J.**—Knowing the extreme accuracy of my brother *Littledale*, in all matters of pleading, I have no difficulty in holding this good.

## Verdict—Guilty. (a)

(a) Counsel for the prosecution, *Carrington*; for the prisoner, *F. V. Lee*.

By the stat. 7 *Geo.* 4, c. 64, s. 20, it is enacted, "That no judgment upon any indictment

or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of a proper or perfect venue,

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where the Court shall appear, by the indictment or information, to have jurisdiction over the offence." In the case of *Rex v. Bullock*, (Cor. 12 Js.), Carr. Supp. 282, which was a case before the passing of the stat. 7 Geo. 4, c. 64, the prisoner was indicted for breaking into a house and stealing to the amount of 40s. The house was laid to

be in the parish of "St. Botolph, Aldgate," and it appeared that the parish where the house was situate, was "St. Botolph, *without* Aldgate." The prisoner was convicted of larceny; and the twelve Judges held that he was rightly convicted, as there was no proof that there was no such parish in the county as that named.

### REX v. HANNAH HARLEY.

If a servant put poison into a coffee pot which contains coffee, and when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her (the mistress's) breakfast, and the mistress drink the poisoned coffee—This is a "causing the poison to be taken," within the stat. 9 Geo. 4, c. 31, s. 11, and the servant is therefore indictable under that act. *Seemle*, that this is also an "administering," within that act, as,

**INDICTMENT** on the statute 9 Geo. 4, c. 31, s. 11. The first count charged that the prisoner did "administer, and cause to be administered, to *Sarah Smith, &c.*, a certain deadly poison called oxyde of arsenic." The third count charged that the prisoner did "cause to be taken" by the said *Sarah Smith* oxyde of arsenic. And the fifth count, that the prisoner "did attempt to administer" to the said *Sarah Smith* oxyde of arsenic. The second, fourth, and sixth counts were similar to the first, third, and fifth, except that they stated the poison to be white arsenic.

The evidence of *Mrs. Smith* was as follows—"I got up at about 7 o'clock. The kettle was on the fire, and the coffee pot was by the side of the grate. I told the prisoner that she had better get her breakfast, as I thought she needed it by that time. She said, she would not have any, it was intended for me. I said to her again, 'Did you put it for me?' and she said 'Yes.' I then toasted a slice off a roll; and was going to put out some tea; but, on the prisoner telling me that the coffee was for me, I put the tea-pot down, and asked *James Thomas* if he would have tea or coffee; and he saying

that act, as, to constitute an administering, it is not necessary that the poison should be delivered by the hand of the party.

he should like some coffee; I poured out some for him and for myself; and I drank it. I poured out a second cup for both, *James Thomas* drank about half his, and I drank the whole of mine. *James Thomas* complained that his coffee made him sick; and he left the room. I felt quite well at this time, but in about five minutes I became very ill indeed," &c. &c.

It was distinctly proved, that this coffee-pot contained arsenic mixed with the coffee.

*C. Phillips*, for the prisoner. I submit that there is in this case no evidence of an administering; there is no proof that the prisoner handed this coffee to *Mrs. Smith*. The mere mixing of poison, and leaving it in some place for the person to take it, is not sufficient to constitute an administering; it must be given into the hand of the party. In the case of *Rex v. Cadman (a)*, it was considered that the swallowing of the poison was not essential, but that some of the poison must be applied to the person to whom it is administered; and that case clearly shews, that the delivery of the poison to the hand of the party is the main ingredient of the offence; and that, if the poison had been laid down, or left in a place to which the prosecutrix had access, that would not have been sufficient.

*PARK, J.*—There is another report of the case of *Rex v. Cadman (b)*, and the two reports differ materially. My memory is, that *Mr. Carrington's* report is accurate, and that the Judges held, that it was no administering, unless the poison was taken into the stomach.

*C. Phillips*. My argument is, that unless there was a manual delivery to the party, it is not sufficient.

(a) R. & M. C. C. R. 114.

(b) Carr. Supp. 237.

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PARK, J.—If, according to the report you have cited, the delivery into the hand is not enough, and the taking it into the stomach is immaterial, I can hardly say what would be enough in any case. If I call in a physician, and he writes his prescription, and I take the medicines, is that not an administering by him?

*C. Phillips.* That is an act done by the physician. To constitute an administering it must be given and also taken.

PARK, J.—I have my own note of the case of *Rex v. Cadman*. That being a case on a Welch circuit, we certify our opinion under our hands. The Welch Judges have no right to reserve cases directly for the opinion of the twelve Judges. They petition his Majesty, who refers the matter to us, and we sign a letter stating our opinion; and of all such letters Lord *Tenterden* keeps copies. My note of the case is, that the Judges were unanimously of opinion that the poison had not been administered, because it had not been taken into the stomach, but only into the mouth.

*C. Phillips.* Administering is an act. Suppose the poison had been mixed and laid by for a month, and that a stranger had gone in and taken it. If that stranger had died, it would no doubt have been murder; but still there is no administering: and the indictment in such a case would charge, not an administering, but that the prisoner did maliciously lay the poison in a certain place, and that the deceased, not knowing it to be poison, took it. There is no count in this indictment which does not require an agency on the part of the accused. A “causing to be taken,” includes an act, and so does an “attempt to administer.”

*Corbet*, for the prosecution. I was counsel in the case of *Rex v. Cadman*, and my recollection coincides with your Lordship's note, and with Mr. *Carrington's* book. I submit that, in the evidence of Mrs. *Smith*, there is evidence to go to the jury on all the counts.

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*C. Phillips*. When a new offence is created by an act of parliament, we must construe it to the very letter.

PARK, J. (in summing up).—There has been much argument whether, in this case, there has been an administering of this poison. It has been contended, that there must be a manual delivery of the poison, and the law, as stated in Messieurs *Ryan & Moody's* Report, goes that way; but as my note differs from that report, and also from my own feelings, I am inclined to think that some mistake has crept into that report. It is there stated, that the Judges thought the swallowing of the poison not essential; but my recollection is, that the Judges held just the contrary. I am inclined to hold that there was an administering here; and I am of opinion, that, to constitute an administering, it is not necessary that there should be a delivery by the hand. With respect to the question, whether the prisoner "did cause the poison to be taken" by Mrs. *Smith*, it has been proved, that she said that she put the coffee-pot down for Mrs. *Smith*, and that upon this Mrs. *Smith* drank some of the coffee: and if you believe the evidence of Mrs. *Smith*, I am of opinion that this is a "causing to be taken," within this act of parliament.

Verdict—Not guilty(a).

(a) Counsel for the prosecution, *Corbet*; for the prisoner, *C. Phillips*.

By the stat. 9 Geo. 4, c. 31, s. 11, it is enacted, "That if any person unlawfully and malicious-

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ly shall administer or attempt to administer to any person, or shall cause to be taken by any person, any poison or other destructive thing, or shall unlawfully and maliciously attempt to drown, suffocate, or strangle any person, or shall unlawfully and maliciously shoot at any person, or shall, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded

arms at any person, or shall unlawfully and maliciously stab, cut, or wound any person, with intent, in any of the cases aforesaid, to murder such person, every such offender, and every person counselling, aiding, or abetting such offender, shall be guilty of felony, and, being convicted thereof, shall suffer death as a felon."

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REX v. JOHN BLICK.

If an indictment against a receiver state the principal felony to have been committed by *A.B.*, whatever would have been evidence of the principal felony to convict *A.B.* is receivable to prove this allegation on the trial of the receiver, but is not conclusive. Therefore, if *A.B.* confessed the principal felony, that confession is admissible on the trial of the receiver, to prove the commission of the principal felony. *Seemle*, that the stealing of brass, fixed to tomb-stones in a church-yard, is a felony within 7 & 8 *Geo. 4*, c. 29, s. 44.

**INDICTMENT** for receiving stolen brass. The first count of the indictment stated, that one *Edwin Smith*, at the General Quarter Sessions, &c., was convicted of stealing brass, fixed in the church-yard at Minchinhampton, that being a "place dedicated to public use," and that the prisoner received it, knowing it to be stolen. In another count, the stealing was stated to be by a certain evil-disposed person to the jurors unknown.

Evidence was given that the brass was fixed into many of the tomb-stones in the church-yard at Minchinhampton, and that it had been stolen, and it was also proved that a considerable portion of the brass was found in the house of the prisoner. To prove that the brass was stolen by *Edwin Smith*, an examined copy of the record of his conviction was put in, and by that it appeared that he had pleaded guilty.

*Ludlow*, Serjt., and *Talfourd*, for the prisoner. This is a judgment against the principal by confession. Now, *Seemle*, that the stealing of brass, fixed to tomb-stones in a church-yard, is a felony within 7 & 8 *Geo. 4*, c. 29, s. 44.



the accessory is not bound, even by a verdict against the principal, and still less is he bound by a confession. There is no evidence of the guilt of the principal, except his own confession, which is not evidence against the accessory; and with respect to the count which charges that the brass was stolen by a person unknown, that must fail, because the principal is known. There is another objection, which is this, the stealing of this brass is not a felony. By the statute 7 & 8 Geo. 4, c. 29, s. 44, it is enacted, that if any person shall steal, &c., any brass, &c., fixed for a fence, "to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony." The prosecutor relies on the words, "place dedicated to public use," and if this case does not come within those words, it is neither within the act of parliament, nor is it the offence charged by this indictment. The word place, in the statute, being joined with the words, square and street, must clearly mean a place *ejusdem generis*, and not a church-yard.

BOSANQUET, J.—There is no doubt that the accessory may controvert the guilt of the principal; but I take it, that whatever is evidence against the principal is *primâ facie* evidence of the principal felony, as against the accessory; and if the principal is convicted on his own confession, that is *primâ facie* evidence of his guilt as against the accessory, but not conclusive. If this objection were valid, it would set up the last count of the indictment, because, if this is not evidence as to the person who stole the brass, there is no evidence to shew who did it: though I agree that, if an offence is charged to have been committed by a person unknown as principal, and it appear that he is known, the prosecution must fail. With respect to the other point, this statute,

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which is rather peculiarly worded, makes it an offence to steal brass fixed in any square, street, or other place, dedicated to public use or ornament; and I think that a church-yard is a place of that kind, within the meaning of this act. If the prisoner is convicted, I do not say that I will reserve the point, but I will take it into further consideration.

The prisoner was acquitted on the merits(a).

(a) Counsel for the prosecution, *Maclean*; for the prisoner, *Ludlow*, Serjt., and *Talfourd*.

By statute 7 & 8 Geo. 4, c. 29, s. 44, it is enacted, "That, if any person shall steal or rip, cut or break, with intent to steal, any glass or wood-work belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private pro-

perty, or for a fence to any dwelling-house, garden, or area, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and, being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person."



REX v. HANNAH KINGSTON.

A girl was charged with administering poison, with intent to murder. The surgeon said to her, "you are under suspicion of this and you had better tell all you know." After this she made a statement to the surgeon:—Held, that that statement was not admissible in evidence.

INDICTMENT for administering arsenic to *Eliza Bates*, with intent to murder her. It appeared, that the surgeon who was called in saw the prisoner, and said to her, you are under suspicion of this, and you had better tell all you know; and after this she made a statement to the surgeon.

After this she made a statement to the surgeon:—Held, that that statement was not admissible in evidence.

PARK, J. having conferred with LITLEDALE, J., held, that evidence of this statement was inadmissible.

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Verdict—Not guilty (a).

(a) Counsel for the prosecution, *Hunt*; for the prisoner, *Storks*.

See the cases referred to, Carr. Supp. 58; and the case of *Rex v. Claves*, 4 C. & P. 221.

REX v. CHILD and others.

**INDICTMENT** on the statute 1 Geo. 1, st. 2, c. 5, s. 1, (the riot act), for a capital felony, in remaining together for one hour after the making of the proclamation under that statute (b).

(b) By the stat. 1 Geo. 1, stat. 2, c. 5, s. 1, it is enacted, "That if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the public peace, at any time after the last day of July, in the year of our Lord one thousand seven hundred and fifteen, and being required or commanded by any one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head officer, or justice of the peace of any city or town corporate, where such assembly shall be, by proclamation to be made in the king's name, in the form hereinafter directed, to disperse themselves, and peaceably to depart to their

habitations, or to their lawful business, shall, to the number of twelve or more (notwithstanding such proclamation made) unlawfully, riotously, and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such continuing together to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons, and shall suffer death as in case of felony without benefit of clergy."

And by sect. 2 of the same statute, it is enacted, "That the order and form of the proclamations that shall be made by the authority of this act, shall

If, in reading the proclamation from the riot act, the magistrate omit to read the words "God save the King," at the end of it, persons remaining together an hour after such reading of the proclamation cannot be capitally convicted under sect. 1 of that act.

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It appeared that about two hundred and fifty persons had assembled together in a riotous manner, and had threatened to break threshing-machines, when Dr. Jones, a magistrate, read the proclamation from the riot act, 1 Geo. 1, stat. 2, c. 5; but, in the reading of it, he omitted to read the words "God save the King," at the conclusion.

VAUGHAN, B., and ALDERSON, J., held, that, as those words at the end of the proclamation were omitted to be read, the charge could not be supported.

Their Lordships directed an

Acquittal(a).

be as hereafter followeth, (that is to say), the justice of the peace, or other person authorised by this act to make the said proclamation, shall, among the said rioters, or as near to them as he can safely come, with a loud voice command, or cause to be commanded, silence to be, while proclamation is making; and after that, shall openly and with loud voice make or cause to be made proclamation in these words, or like in effect:—

"Our sovereign lord the king chargeth and commandeth all persons, being assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for

preventing tumults and riotous assemblies.

God save the King.'

"And every such justice and justices of the peace, sheriff, under-sheriff, mayor, bailiff, and other head officer, aforesaid, within the limits of their respective jurisdictions, are hereby authorised, empowered, and required, on notice or knowledge of any such unlawful, riotous, and tumultuous assembly, to resort to the place where such unlawful, riotous, and tumultuous assemblies shall be of persons to the number of twelve or more, and there to make or cause to be made proclamation in manner aforesaid."

(a) Counsel for the prosecution, *Denman*, A. G., *Dampier*, and *Follet*; for the prisoners, *Sewell*.

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REX v. MACKEREL and another.

**INDICTMENT** for destroying a threshing-machine. The first count of the indictment charged the prisoners with "breaking" the machine. The second count charged them with "destroying" it. The third count with "damaging it with intent to destroy it." And the fourth count with "damaging it with intent to render it useless."

It appeared that a mob had come to the house of the prosecutor to destroy his threshing-machines, and the prisoner's counsel was proceeding to shew, by cross-examination, that the prosecutor, in expectation of the coming of the mob, had himself taken his threshing-machine to pieces, and that the prisoners only broke the detached parts of it.

If a person has had a threshing-machine taken to pieces, he expecting a mob to come and destroy it, and the mob come and destroy the different parts of the machine when thus separated—  
This is a felony within 7 & 8 Geo. 4, c. 30, s. 4.

PARK, J.—It has been held by the Judges, both at Reading and Winchester, that the offence is made out, although, at the time when the machine is broken, it has been taken to pieces, and is in different places, only requiring the carpenter to put those pieces together again. There have been several convictions under such circumstances.

Verdict—Guilty(a).

(a) Counsel for the prosecution, *Gurney, Campbell, Shepherd, Blackburn, and Talfourd*; for the prisoners, *Carrington*.

By the stat. 7 & 8 Geo. 4, c. 30, s. 4, it is enacted, "That if any person shall unlawfully and maliciously cut, break, or destroy, or damage with intent to destroy or to render useless, any threshing-machine, or any machine or

engine, whether fixed or moveable, prepared for or employed in any manufacture whatsoever, (except the manufacture of silk, woollen, linen or cotton goods, or goods of any one or more of those materials, mixed with each other, or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace), every such offender shall

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be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the Court shall so think fit) in addition to such imprisonment."

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REX v. FIDLER and others.

A. had a threshing-machine worked by water, the water-wheel having been put up for the sole purpose of working this machine, and never having been used for any thing else. A., fearing the destruction of the machine by a mob, took it down, leaving the water-wheel standing. The prisoners broke the water-wheel:—Held, to be a felony, under the stat. 7 & 8 Geo. 4, c. 30, s. 4; and the fact that A. sometimes worked the threshing-machine by horses will make no difference.

**INDICTMENT** for destroying and damaging a threshing-machine. The indictment was in the same form as in the preceding case.

The prosecutor stated, that his threshing-machine was worked by water; and that, expecting a mob would come to break it, he had had it taken to pieces, and had removed the pieces to a barn at the distance of a quarter of a mile, leaving no part of it standing but the water-wheel and its axis, and a brass joint, which was joined to the axis of the water-wheel; and that this water-wheel was broken by a mob, of which the prisoners formed a part. The prosecutor stated, that this water-wheel had been put up for the sole purpose of working the threshing-machine, and had never been used for any thing else, except sometimes to work a chaff-cutter, which was appended to the threshing-machine.

*Carrington*, for the prisoners. I submit that the breaking of this water-wheel was not a breaking of any part of the threshing-machine, this wheel not being any part of the machine, but the moving power, which was applied to set it in motion; and therefore, when the threshing-machine was slipped out of the brass joint, any other machinery might be applied to the joint, and the wheel would then set that machinery to work the same as it did the threshing-machine. Indeed, if this wheel

was held to be a part of the threshing-machine, a steam engine must be held to be so too, provided that the threshing-machine had been worked by steam; and it is manifest that the moving power is no part of the machine which it works, because in manufactories nothing is more common than for one machine to be slipped out of the joint which connects it with the moving power, and for another machine to be slipped into it, as the business of the manufactory requires.

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*Gurney, Campbell, Shepherd, and Blackburn*, contra. The moving power is an essential part of the machine. In threshing-machines, it is generally a horse-wheel, in this instance it happens to be a water-wheel. Now, in at least ten cases, where all the other parts of the machines had been carried away by the owner except the horse-wheel, and the horse-wheel was broken by the mob, it was held that that was an offence within the act of parliament; and this case is certainly not distinguishable from any of those. Another thing shews that this was not only a part of the machine, but an essential part, for, when this was destroyed, the machine could not work.

PARK, J.—We think that there is nothing in this objection. We think that the machine, when all together, was a threshing-machine, and that this wheel was a part of it; and besides, this wheel had never been used for any other purpose.

BOLLAND, B.—The objection is, that this water-wheel was no part of the threshing-machine. Perhaps, there is rather an inaccuracy in calling this wheel the moving power. The moving power of machinery may either be horses, the hand, water, or steam; and this

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which was broken, was, in fact, the first or great wheel of the machine, to which the power was applied. With respect to the fact that this wheel might have been applied to other machinery, the same may be said of the horse-wheels. If a horse-wheel stood in a farm-yard, the owner, by adding some gear, might make it draw water.

PATTESON, J.—This wheel is that to which the power was applied.

*Carrington*.—It has been suggested to me, that the prosecutor sometimes worked his threshing-machine by horses when there was a scarcity of water.

PARK, J.—We think that that would make no difference.

The prisoner Fidler was acquitted on the merits, and the other prisoners found guilty(a).

(a) Counsel for the prosecution, *Gurney, Campbell, Shepherd, Blackburn, and Talfourd*; for the prisoners, *Carrington*.



#### STOCKEN v. CARTER.

A police constable is not justified under the stat. 10 Geo. 4, c. 44, s. 7, in laying hold of, pushing along the highway, and ordering to be off, a person found by him conversing in a crowd with another, merely because the person with whom he happens to be conversing is known to be a reputed thief.

THE plaintiff, in his declaration, complained that the defendant, on the 21st of July, 1830, seized him by the collar, and struck him several blows, and pushed him along on the king's highway, &c. Plea, not guilty.

On the part of the plaintiff, two witnesses were called, from whose evidence it appeared, that, on the day named in the declaration, between 11 and 12 in the morning, a crowd of persons were assembled in front of Apsley-

crowd with another, merely because the person with whom he happens to be conversing is known to be a reputed thief.



house, the residence of the Duke of *Wellington*, in expectation of the arrival of his Majesty, who, it was understood, was going to visit him; that the plaintiff, who, according to their account, had the appearance of a respectable tradesman, was among the spectators; that the defendant, who was an inspector of police, called out—"Ladies and gentlemen, take care of your pockets, you've got pickpockets and thieves here among you;" and immediately pushed the plaintiff with his hand, saying—"You had better be off;" that the plaintiff remonstrated, and said that he was not a thief or a pickpocket; but that the defendant kept pushing him repeatedly, and telling him to be off; that the plaintiff told him his name, and where he lived, to which the defendant replied—"I know you well, I know what you are, and where you live. You had better be off, or I'll put you somewhere, which you won't like;" all the time keeping his hand on his collar; and that, at last, he gave him a violent push into the road. On their cross-examination they admitted that the plaintiff was, at the time the defendant spoke to him, in conversation with a man, who, on hearing what the defendant said, immediately went away. It appeared, that, in fact, the plaintiff was, as he told the defendant, a furnishing undertaker, residing at Knightsbridge.

On the part of the defendant, six police constables, and two other witnesses, were called, who swore, that the defendant did not touch the plaintiff at all; and *Mr. Mayne*, one of the police commissioners, proved, that when the plaintiff came to make complaint against the defendant before him, he only charged him with having accused him of being a thief, and did not say any thing about any assault upon him. One of the defendant's witnesses also proved, that he knew the person with whom the plaintiff was conversing to be a reputed thief.

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*Taddy*, Serjt., for the plaintiff. The circumstance of a man's being seen conversing in a crowd with a person whom he does not know, and who turns out afterwards to be a reputed thief, is no justification of a police officer in charging both with being pickpockets. He ought, on the contrary, to have warned the plaintiff as to the company he was in. A man cannot, under such circumstances, chuse his company, or refuse to listen to any observation which may be made as to the carriages or the king's visit, or on similar subjects. The words of the police act (a) only authorise a police man to apprehend loose, idle, or disorderly persons disturbing the public peace, or those whom he has just cause to suspect of evil designs, &c. Now the defendant had no just cause to suspect the plaintiff. He might have such cause with respect to the other person with whom the plaintiff was conversing; for perhaps it would be holding it too strictly, to contend that a policeman is bound to know the facts himself. But the mere circumstance of contiguity in a crowd is not sufficient to justify an officer in supposing a person to have any evil design. It is clear, that if the plaintiff was

(a) 10 *Geo. 4*, c. 44, s. 7, enacts, —“ That it shall be lawful for any man, belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs, and all persons whom he shall find between sunset and the hour of eight in the forenoon, lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account

of themselves, and to deliver any person so apprehended into the custody of the constable appointed under this act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, or may give bail for his appearance before a justice of the peace, if the constable shall deem it prudent to take bail in the manner herein-after mentioned.”

pushed off the pavement, with the violence stated by his witnesses, the defendant exceeded his authority. The plaintiff was not obliged to go, he was no thief, and the defendant had no right to make him go. Therefore, if any assault was committed, the plaintiff is entitled to damages. You will have to say, first, whether an assault was or was not committed; and secondly, if there was an assault, had the defendant any reason to suspect the plaintiff of evil designs? If you think that he certainly had not, then there is no justification of the assault, and you will shew, by the damages you give, that the public must be protected against such random acts as that complained of.

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GASELEE, J. (in summing up) said—The material question is, whether any assault was committed. If you think the assault is proved, then you will have to ascertain what damages the plaintiff is entitled to; and, in doing this, you may take into consideration the circumstances attending the assault; and if you think it was attended with circumstances of aggravation and insult, you may give such compensation as you think right, for the injury done to the wounded feelings of the plaintiff. If the plaintiff was at the place in question under circumstances, which gave the police officer reason to believe that he was there with any evil design, the officer would have been justified in apprehending him. But the defence is not rested upon that ground, the main question made is,—“Was there any assault or not?” There is no evidence of the conversation between the plaintiff and the reputed thief, it might be about the common topics of the day. There are six police officers, who all swear that the defendant never touched the plaintiff at all. There is no doubt that the plaintiff supposed that the defendant intended to charge him with being a pick-

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pocket. It is important to the public that they should be protected in their liberty ; and, on the other hand, it is important that the police of the country should be upheld, if they conduct themselves properly. If you find a man making a mistake acting *bonâ fide*, (for there is no pretence of any malice in this case), though you may think yourselves bound to give a verdict against him, yet you will not visit him with damages for that which was a mere error. But the material question is as to the assault, which is positively sworn to by two witnesses for the plaintiff, and as positively denied by six or seven for the defendant.

The jury retired, and, after several hours' deliberation, returned a verdict for the plaintiff, damages, one farthing (*a*).

(*a*) Counsel for the plaintiff, for the defendant, *Andrews* and *Taddy*, Serjt., and *Platt*; and *Bompas*, Serjts.

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CALLO v. BROUNKER.

To justify a master in dismissing a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect.

THE first count of the declaration stated, that the defendant was indebted to the plaintiff in 200*l.*, for wages or salary as a hired servant. The second count stated, that, in consideration that the plaintiff, at the special instance and request of the defendant, would enter into and continue in her service as a hired servant and courier, for the space of one whole year, to travel with her during that period from Great Britain to divers foreign parts and places, she undertook to maintain and continue him in her service as her hired servant and courier, for and during the said space of one whole year, provided he behaved and conducted himself properly as such courier and ser-

vant, and to pay him wages at the rate of 10*l.* a month. It then averred, that the plaintiff entered into the service of the defendant, and travelled with her to Florence, and continued there for four months, during all which time he, to the best of his ability and power, performed the duties and offices of a courier and true and faithful servant to her, and at all times during the continuance of the said space of one whole year was ready and willing to have stayed and continued in her service, and to have performed his duties; yet the defendant, not regarding her promise, &c. before the expiration of the said period, to wit, &c. wrongfully and improperly, and without any reasonable or justifiable cause, discharged him from her service at Florence, and thenceforth wholly refused to maintain or continue him in her service, or to pay him, for the residue of the year, any wages whatever, by means whereof he not only lost wages to the amount of 80*l.* but was forced to maintain himself at his own costs, and to lay out large sums as travelling expenses, in returning from Florence to Great Britain. There were other common counts; and the plea was the general issue.

On the part of the plaintiff, the hiring for a year, from the 1st of August, 1827, at 10*l.* a month, was proved; and it appeared that he went as courier with the defendant, who was a widow lady, and her family, to the Continent, and in the month of December, 1827, when they were at Florence, he was dismissed from the service.

On the part of the defendant it was proved, that, on getting into the carriage at the stage before Padua, the defendant desired the plaintiff not to stop at a particular hotel, where they had been before, but to drive to another; but that he, notwithstanding, did stop at that hotel; and, when remonstrated with, said he had not been told; and at the second hotel appeared to be very sulky; and also that he had neglected to come on two or three occa-

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sions when he had been rung for, and was insolent in his manner at Florence.

Sir *J. Scarlett*, for the defendant, contended that this was such improper conduct as justified the defendant in dismissing the plaintiff.

*Campbell*, for the plaintiff, argued that there must be gross misconduct to produce a dissolution of the contract, and that no such conduct had been proved against the plaintiff.

PARKE, J., told the jury, that there was a contract for a year, with an implied agreement, that, if there was any *moral misconduct*, either pecuniary or otherwise, *wilful disobedience*, or *habitual neglect*, the defendant should be at liberty to part with the plaintiff. His Lordship added, that, in his opinion, no such conduct had been proved, and that the plaintiff was entitled to his wages for the year (*a*).

Verdict for the plaintiff, damages, 67*l.* 10*s.* afterwards reduced by consent on motion (*b*).

(*a*) 15*l.* had been received on account, and 62*l.* 10*s.* was paid into Court. *Campbell* and *Watson*; and for the defendant, Sir *J. Scarlett* and *Long*.

(*b*) Counsel for the plaintiff,

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REX v. EDMUND MEAD.

The halves of country bank notes, sent in a letter, are goods and chattels; and a person who steals or embezzles them is indictable for such larceny or embezzlement.

**EMBEZZLEMENT.** The indictment, in some of the counts, charged the prisoner with embezzling pieces

of paper of the value of one penny, the property of his master; and, in other counts, the property was stated to be "pieces of paper partly written and partly printed," bearing stamps, the values of which were specified. All the counts charged the property to be "of the goods and chattels of *Samuel Cooper*."

It appeared that the prisoner was the servant of Mr. *Cooper*, of Henley; and that it was his duty to fetch the letters from the post-office. It was proved that the stamp distributor at Banbury had remitted to Mr. *Cooper*, by post, the first halves of country bank notes to the amount of 190*l.*; and evidence was given to shew, that this letter was received by the prisoner, at the post-office at Henley, and that he afterwards embezzled the halves of the notes.

*Carrington*, for the prisoner, submitted that these halves of country bank notes were not goods and chattels. If the notes had been entire, they would have been *choses in action*, not goods and chattels; but, in their present state, they were of no value.

BOSANQUET, J.—They might have been made of value to Mr. *Cooper*, by his putting the two halves together. In the case of *Rex v. Clark*, country bank notes, which had been paid in London, and were sent back to the country to be re-issued, were held to be the subject of larceny, because they were of value to the bankers, as being re-issuable (*a*). I will consider of the objection,

(*a*) 2 Leach, 1086. In that case *Grose*, J., in delivering the judgment of the twelve Judges, said—"Their value and character as promissory notes were certainly extinct at the time they were

stolen; but they bore about them a capability of being legally restored to their former character and pristine value. They were indeed only of value to their owners; but it is enough that

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and if I should think it is a valid one, I will give the prisoner the benefit of it.

Verdict—Guilty (a).

The prisoner was afterwards sentenced to be transported for seven years.

they were of value to them; their value as to the rest of the world is immaterial."

In the case of *Rex v. Vyse, R. & M. C. C. R. 218*, it was held, that re-issuable notes, if they could not be properly called valuable securities while in the hands of the maker, were goods and chattels, and that a party might be indicted for receiving them, knowing them to have

been stolen. In that case some of the counts described the notes as pieces of paper, stamped with certain stamps (describing them) of the goods and chattels, &c., and in the other counts they were described as promissory notes.

(a) Counsel for the prosecution, *Chilton and Walesby*; for the defence, *Carrington*.

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#### REX v. PERKINS and others.

Persons who are present at a prize-fight, and who have gone thither with the purpose of seeing the persons strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the actual combatants; and it is not at all material which of the combatants struck the first blow.

**INDICTMENT** for a riot and an assault on *Robert Coates*.

It appeared that a prize-fight was fought between the defendant *Perkins* and *Robert Coates*, and that another of the defendants, named *Weekly*, acted as the second of the defendant *Perkins*, and that the two other defendants were present, the one collecting money for the combatants, and the other walking round the ring and keeping the people back. It appeared that many hundred persons were assembled, and that the defendant *Perkins* struck the first blow.

**PATTESON, J.** (in summing up).—It appears, in this case, that a great number of persons were assem-



bled together on this occasion, and that there was a breach of the peace. It is clear that the parties went there intending that a breach of the peace should be committed. There is no doubt that prize-fights are altogether illegal; indeed, just as much so, as that persons should go out to fight with deadly weapons; and it is not at all material which party struck the first blow. It is proved that all the defendants were assisting in this breach of the peace; and there is no doubt that persons who are present on such an occasion, and taking any part in the matter, are all equally guilty as principals.

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The foreman of the jury said, that they doubted whether they could find all the defendants guilty of an assault.

PATTESON, J.—If all these persons went out to see these men strike each other, and were present when they did so, they are all, in point of law, guilty of an assault. There is no distinction between those who concur in the act and those who fight.

Verdict—Guilty of the riot, but not guilty of the assault (a).

See *Rex v. Billingham*, 2 C. & P. 234.

(a) Counsel for the prosecution, *Cooper*; for the defence, *Ludlow*, Serjt.

### REX v. DAVID DUNN.

**LARCENY.** The prisoner was indicted for stealing a hymn-book, the property of *Eliza Thompson* (b).

(b) The hymn-book was stolen from a dissenting chapel, which was broken into, but the offence was not laid as sacrilege, it being a session made to *that person*, although that person was not in any authority as prosecutor, constable, or the like.

*Any person's* telling a prisoner that it will be better for him to confess, will exclude a confession.

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A witness, named *Fieldhouse*, proved that the prisoner wished to sell the book to him, and that he told the prisoner he had better tell where he got it.

BOSANQUET, J.—You must not tell us what he said.

*Scott*, for the prosecution. This witness was not a person in any authority.

BOSANQUET, J.—Any person telling a prisoner that it will be better for him to confess, will always exclude any confession made to that person. Whether a prisoner's having been told by one person that it will be better for him to confess, will exclude a confession subsequently made to another person, is very often a nice question; but it will always exclude a statement made to the same person (*a*).

The evidence was rejected.

Verdict—Guilty.

considered by the prosecutor that the stat. 7 & 8 Geo. 4, c. 29, s. 10, did not extend to dissenting chapels. In the stat. 7 & 8 Geo. 4, c. 30, s. 8, where the legislature intended to include dissenting chapels, they have used different words. See those sections in Carr. Supp. 209 and 289.

(*a*) In the case of *Rex v.*

*Slaughter*, for arson, tried on the same day, *Bosanquet, J.*, rejected a confession made by the prisoner to one of his fellow workmen, who had told him it would be better for him to confess. See the cases of *Rex v. Gibbons*, 1 Car. & P. N. P. C. 97, and *Rex v. Tyler*, 1 Car. & P. N. P. C. 129.



REX v. WESTWOOD and others.

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**INDICTMENT** on the statute 9 Geo. 4, c. 69, s. 9, for poaching in the night, with other persons armed, to the number of more than three, in certain inclosed land of *Edward John Littleton, Esq.*

To prove the identity of the prisoner *Westwood*,

*Talbot*, for the prosecution, proposed to shew that one of the gamekeepers of Mr. *Littleton* lost his coat during an affray which occurred on the occasion in question, and that his coat was found in the prisoner *Westwood's* house.

*Greaves*, for the prisoners, objected to the reception of this evidence, as there was a separate indictment against the prisoner *Westwood* for the stealing of this coat. And he cited the case of *Rex v. Smith (a)*. [*Patteson, J.* In the case of *Rex v. Ellis (b)*, it was held that where several felonies form parts of one transaction, you may give evidence of them all.] In that case there was only one indictment.

On an indictment for poaching, it was proposed to shew that, on the occasion in question, the prosecutor's gamekeeper lost his coat, which was found in the prisoner's house. There was an indictment against the prisoner for stealing the coat:—Held, that this evidence was inadmissible, unless the prosecutor consented to an acquittal on the indictment for the larceny.

**PATTESON, J.**—That distinguishes the two cases; and I therefore shall not receive the evidence, unless the prosecutor consents to an acquittal on the indictment for larceny.

The evidence was rejected.

Verdict—Guilty.

(a) 2 Car. & P. N. P. C. 633.

(b) 9 D. & R. 174.

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REX v. SWATKINS and others.

In opening a case of felony the counsel for the prosecution should not state particular expressions supposed to have been used by the prisoner, nor the precise words of a confession, but only the general effect of what the prisoner said.

A prisoner was in the custody of *A.*, a constable; *B.*, another constable, coming into the room, *A.* left it, and the prisoner immediately made a confession to *B.*:—Held, that if the prisoner was in custody as an accused party, *A.* must

**INDICTMENT** on the stat. 7 & 8 Geo. 4, c. 30, s. 17, for maliciously setting fire to "one stack of barley, of the value of 100*l.*, of *Richard Powell Williams* (*a*).

*C. Phillips*, for the prosecution, in opening the case, was proceeding to state certain expressions used by the prisoners.

*Godson, Carrington* and *F. V. Lee* objected that, in opening a case of felony, confessions ought not to be stated; because it often turned out that the words, as proved by the witness, materially differed from those put into the brief; and it also frequently happened that, from something which had previously occurred, the statement was rendered inadmissible altogether.

*C. Phillips*, *contra*. If the counsel for the prosecution has a right to open a case, I know of no law which prevents him from stating any evidence that he is instructed that he shall have to lay before the jury.

(*a*) The indictment was in the form given in *Jerv. ed. of Arch. C. L. 262*.

be called to prove that he had held out no inducement to the prisoner to confess, before the confession made to *B.* was receivable in evidence; but if the prisoner was not then in custody on any charge, but merely detained as an unwilling witness, it was not necessary to call *A.* If a prisoner makes a confession to a constable, who takes down what he says, and the prisoner signs it, this paper will be read by the officer of the Court.

An indictment on the stat. 7 & 8 Geo. 4, c. 30, s. 17, charged a party with setting fire to a "stack of barley, of the value of 100*l.* of *R. P. W.*:"—Held good, although the words of the statute creating the offence are "any stack of corn or grain":—Held also, that the words "of *R. P. W.*" sufficiently stated the property:—Held also, that if the indictment state that the prisoner, on, &c. at, &c., feloniously, unlawfully, and maliciously did set fire to a certain stack of barley of the value of 100*l.* of *R. P. W.* then and there being," this is sufficient, without stating that the prisoner, on, &c. at, &c., feloniously, unlawfully, and maliciously did then and there set fire to the stack.

*Godson*, in reply. We do not put it as a matter of strict law; but what I submit is, that, in practice, confessions ought never to be opened.

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PATTESON, J. (having conferred with *Bosanquet*, J.)—My learned brother and myself are of opinion that the correct practice is for the counsel for a prosecution, in a case of felony, not to state any expressions that are supposed to have been made use of by a prisoner, or the exact words of any supposed confession; but we think that he may state their general effect.

A constable was called to prove a confession made to him by the prisoner *Swatkins*. This constable stated that he went into a room in a public-house at Imley, where he found the prisoner *Swatkins* in the custody of another constable; and that, as soon as he (the witness) went into the room, the other constable left it, and the prisoner immediately made a statement.

*Godson* and *Carrington*, for the prisoner *Swatkins*, objected that before this statement was receivable, the other constable must be called, to prove whether he had held out any inducement to the prisoner to make this statement; and that if, without calling that constable, the evidence were receivable, the most dangerous consequences would ensue, as nothing would be more easy than for one constable to hold out the inducement to confess, and another to come into the room and receive the confession.

*C. Phillips* and *Talbot*, contra. If we call the person to whom the confession is made, and he did not hold out any inducement to the prisoner to confess, that is all that

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states that they, on such a day and at such a place, "feloniously, unlawfully and maliciously, did set fire to a certain stack of barley, of *Richard Powell Williams*, then and there being." Now it ought to charge that the prisoners "feloniously, unlawfully and maliciously, did *then and there* set fire to a certain stack of barley."

*C. Phillips and Talbot*, contra. With respect to the last objection, of the omission of the words "then and there," that, if it ever was an objection, is aided by the stat. 7 *Geo.* 4, c. 64, s. 20, which relates to defects in the statement of the time and the venue. And with respect to the stack being described as a stack of barley, that is stating the offence with sufficient certainty to inform the prisoner what he is charged with. The question is, whether barley is grain, which it undoubtedly is. It is said, that the offence must be charged in the words of the statute creating it. It is not, however, in all cases sufficient to follow the words of the statute; for, where the words are general, the species must be specified, as was held in a case of maiming cattle (*a*); and if we had charged this as a setting fire to a stack of grain, it would have been objected that the species of grain ought to have been specified. With respect to the remaining point, the statement that it is the stack of *Richard Powell Williams*, is tantamount to alleging it to be his property.

PATTESON, J.—The only question is, whether I am bound to take judicial notice that barley is either corn or grain (*b*).

(*a*) *Rex v. Chalkley*, R. & R. C. C. R. 258.

(*b*) It may be proper to observe, that barley is mentioned as corn in several acts of parliament which relate to the impor-

tation of corn: for example, by the stat. 55 *Geo.* 3, c. 26, s. 3, it is enacted, that foreign corn, meal, or flour, may be imported for home consumption, "when- ever the average prices of the

His Lordship having conferred with Mr. Justice *Bosanquet*, said—I do not think that the objection respecting the omission of the words “then and there,” is tenable; and I think that the statement of the property is sufficient. I also think that the charging the offence as the setting fire to a stack of barley, is sufficient; but if, on further consideration, I should think that there is any weight in that objection, I will reserve it for the consideration of the Judges (a).

The jury found the prisoners Swatkins and Lloyd guilty, and Timmins not guilty.

The prisoners Swatkins and Lloyd were afterwards executed.

*several sorts of British corn*, made up and published in the manner now by law required, *shall be at or above the prices hereafter mentioned*, that is to say, whenever wheat shall be at or above the price of eighty shillings *per quarter*; whenever rye, peas, and beans, shall be at or above the price of fifty-three shillings *per quarter*; *whenever barley, beer, or bigg*, shall be at or above the price of forty shillings *per quarter*; and whenever oats shall be at or above the price of twenty-seven shillings *per quarter*.” It should also be observed that, in indictments for maiming cattle, the indictment always charges the maiming to be of “a certain cow,” or the like, and never uses the word “cattle;” and in the case of *Rex v. Chalkley*, before cited, it was held that the charging of the party with maiming “certain cattle,” without specify-

ing what species of cattle, would not be sufficient.

(a) At the Reading Spring Assizes, 1831, *William Brown* was charged with having maliciously set fire to a stack of straw. It appeared that the wheat had been cut and carried, and that the stubble had been mown off, and made into the rick in question; and this was called by the witnesses a haulm rick. It was objected, that this was not a stack of straw, as the material of which it was made was not straw. *Patteson*, J., said, he would not stop the case, as it might be argued that every part of the stalk of the corn, when cut, was straw; but that, if the prisoner was convicted, he would reserve the point, as he considered it of great importance that it should be decided whether stacks of this kind were within the act of parliament or not.

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## REX v. WEBB and GODDARD.

A prisoner, when before the committing magistrate, was sworn by mistake, he being supposed to be a witness; as soon as the mistake was discovered the deposition which was begun was destroyed and the prisoner cautioned. After this he made a statement:—Held, that such statement was receivable in evidence.

THE prisoners were indicted for arson. For the prosecution, a statement made by one of the prisoners before a magistrate was offered in evidence, and the committing magistrate was called to prove it. He stated, upon cross-examination, that when this prisoner was first brought before the magistrate, it was thought he had appeared as a witness, and by mistake he was sworn; but it being discovered that he was one of the accused persons, the deposition which had been commenced was torn. The prisoner subsequently made a statement after having been cautioned by the magistrate, and that statement was now offered in evidence.

*Ryland*, for the prisoners, objected to this being received in evidence. The whole examination before the magistrate was but one transaction; and an oath having been administered to him, it was binding during the whole inquiry. This statement, therefore, was to be considered as having been made upon oath, and consequently was not receivable in evidence.

GARROW, B.—What was first taken down and afterwards destroyed does not prejudice the prisoner; we do not know what he said; it is as if it never had existed.

The evidence was received and the prisoners were convicted (a).

(a) Counsel for the prosecution, *Adolphus* and *Dowling*; for the prisoners, *Ryland* and *Robinson*.



## REX v. FAGG.

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**THE** prisoner was indicted for arson.

The counsel for the prosecution offered in evidence a statement in writing made by the prisoner before the magistrates, and which it appeared he had made before the evidence in support of the charge had been gone through.

If a prisoner is brought before a magistrate, his statement ought not to be taken till the evidence against him is gone through, and he should be then asked, if he has any thing to say in answer to the charge.

GARROW, B., inclined strongly to think that it was inadmissible. His Lordship observed, that nothing which a prisoner stated, before he knew what the evidence against him was, ought to be used to criminate him; and censured the practice of taking such a statement from a prisoner, who should only be asked, if he wished to say any thing in answer to the charge, when he had heard all that the witnesses in support of it had to say against him.

His Lordship, however, admitted the evidence, but expressed his doubts as to its legality.

The prisoner was acquitted (a).

(a) Counsel for the prosecution, *Adolphus* and *Baker*; for the prisoner, *Clarkson*.

## WELLS v. HEAD.

**ACTION** for shooting the plaintiff's dog. It was proved that the dog had worried some sheep belonging to the defendant; but it appeared that he had left the field in which the sheep were, had crossed an adjoining close, and was in a third when the defendant shot him. The owner of sheep in a field which had been worried by a dog, shot the dog when in another field at some distance off:—Held, in an action by the owner of the dog, that the defendant was not justified in the act of shooting, as it was not done in protection of his property.

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ALDERSON, J., said, that whatever the provocation to shoot the dog might be, yet the verdict must pass for the plaintiff, for it was clear that the dog was not shot in protection of the defendant's property, as it was after he had left the field in which the sheep were. But though there could not be a verdict for the defendant, the habits of the dog might be considered in mitigation of damages.

Verdict for the plaintiff, damages, one guinea (*a*).

(*a*) Counsel for the plaintiff, *Storks*, Serjt., and *Bligh*; for the defendant, *Kelly* and *Præd*.

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REX v. PARRATT.

The captain of a vessel said to one of his sailors suspected of having stolen a watch, "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face."—Held, that a confession made by the sailor after this threat was not receivable in evidence on his trial for the felony.

THE prisoner was charged with having robbed *John Field* of his watch at Clay-next-the-sea. It appeared that he was a mariner on board a vessel called the *Abeona*, belonging to Newcastle. The watch was found by the mate of the vessel concealed in the cable, and given by him to the captain. Two hours after this, the captain said to the prisoner, "Parratt, that unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle. You are a damned villain, and the gallows is painted in your face." Upon this the prisoner made a confession, which *Preston*, for the prosecution, proposed to offer in evidence.

*Palmer*, for the prisoner, submitted, that after such a threat, no statement of the prisoner's could be received.

ALDERSON, J., was of that opinion, and the confession was not admitted.

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## REX v. ELIZABETH POWLES.

THE prisoner was indicted for having mixed a quantity of sponge (cut into small pieces) with milk, and given it to her husband, with intent to poison him.

Indictment for mixing sponge with milk, and administering it with intent to poison :— Held, insufficient, for not averring that the sponge was of a poisonous nature.

An objection was taken to the indictment, on the ground that it did not set forth that the sponge was of a deleterious or poisonous nature.

The learned Judge was of opinion that the objection was good, and the prisoner was acquitted.

## REX v. QUINCH.

THE prisoner was indicted for the manslaughter of *W. Abel*. It appeared that the prisoner and the deceased quarrelled, and the deceased provoked the prisoner to fight. After they had fought several rounds, the deceased fell, was conveyed away, and soon after died, before any surgeon arrived to give him assistance. An inquest had been held upon the body, but no surgeon was examined before the coroner.

It is the duty of a coroner in a case of death occurring in a pugilistic encounter, to examine a surgeon as to the cause of the death.

ALDERSON, J., animadverted on this omission on the part of the coroner (*a*), and observed, that in the absence of the testimony of a surgeon, it was impossible to say to what cause the death of the deceased was to be attributed.

The prisoner was acquitted.

(*a*) We were subsequently informed that a surgeon was in attendance at the inquest, but being anxious to be set at liberty, was allowed to depart to attend to his professional duties.

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REX v. WILLIAM PEARSON.

A person employed at a receiving house of the General Post Office, to clean boots, &c., and to assist in tying up the letter-bag, is not a servant of the Post Office, within the stat. 52 Geo. 3, c. 143, s. 2.

A receiving house is not a post-office within that statute, but it is "a place for the receipt of letters;" and the whole shop is to be considered as the "place for the receipt of letters," and not the mere letter-box; and therefore, if a person take a letter and put it on the shop counter of the receiving house, or give it to one of the persons belonging to the shop there, that is putting the letter into the post.

In an indictment on this statute, it was alleged that a letter was "to be delivered at T." The letter was addressed "*T. house*," which was a house in the parish of T.:—Held, sufficient.

To constitute the offence of stealing a letter from a place for the receipt of letters under s. 3 of this act, it is essential that the letter should be carried out of the shop which was the place for the receipt of letters; and therefore, if a person take a letter and steal its contents, without taking the letter out of the shop, that is not an offence within this section of the act of parliament.

**INDICTMENT** on the stat. 52 Geo. 3, c. 143 (*a*).  
The first count stated that the prisoner was employed

(*a*) By the statute 52 Geo. 3, c. 143, s. 2, it is enacted: "That if any deputy, clerk, agent, letter carrier, post-boy, or rider, or any other officer or person whatsoever, employed by or under the Post Office of Great Britain, in receiving, stamping, sorting, charging, carrying, conveying, or delivering letters or packets, or in any other business relating to the said office, shall, after the passing of this act, secrete, embezzle, or destroy any letter or packet, or bag or mail of letters with which he or she shall have been entrusted in consequence of such employment, or which shall in any other manner have come to his or her hands or possession, whilst so employed, containing the whole or any part or parts of any bank note, bank post bill, bill of exchange, exchequer bill, South Sea or East India bond, dividend warrant, either of the Bank, South Sea, East India, or any other company, society, or corporation, navy or victualling, or transport bill, ordnance debenture, seaman's ticket, state lot-

tery ticket or certificate, bank receipt for payment on any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, American provincial bill of credit, goldsmith's or banker's letter of credit, or note for or relating to the payment of money, or other bond or warrant, draft, bill, or promissory note whatsoever for the payment of money; or shall steal and take out of any letter or packet with which he or she shall have been so entrusted, or which shall have so come to his or her hands or possession, the whole or any part or parts of any such bank note, bank post bill, bill of exchange, exchequer bill, South Sea or East India bond, dividend warrant, either of the Bank, South Sea, East India, or any other company, society, or corporation, navy or victualling or transport bill, ordnance debenture, seaman's ticket, state lottery ticket or cer-

by and under the General Post Office of Great Britain, in receiving letters brought to a certain receiving house, situate in the Middle Temple; and that, on the 19th of April, 1 *Will.* 4, a letter containing ten bank notes, of the value of 10*l.* each, came to the hands of the prisoner, while he was so employed, and that he did feloniously secrete and embezzle the same. In this count the notes were stated to be the property of Messrs. *Gosling*. The second count was similar, except that it charged the prisoner with stealing the notes out of the letter. The third and fourth counts were similar to the first and

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tificate, bank receipt for payment of any loan, note of assignment of stock in the funds, letter of attorney for receiving annuities or dividends, or for selling stock in the funds, or belonging to any company, society, or corporation, American provincial bill of credit, goldsmith's or banker's letter of credit or note for or relating to the payment of money, or other bond or warrant, draft, bill, or promissory note whatsoever for the payment of money; every person so offending, being there-of convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy."

By s. 3 of the same statute it is enacted, "That if any person shall, after the passing of this act, steal and take from any carriage, or from the possession of any person employed to convey letters sent by the post of Great Britain or from or out of any post-office, or house or place for the receipt or delivery of letters or packets, or bags or mails of letters sent or

to be sent by such post, any letter or packet, or bag, or mail of letters, sent or to be sent by such post, or shall steal and take any letter or packet out of any such bag or mail, every person so offending, and being thereof convicted, shall be adjudged guilty of felony, and shall suffer death as a felon, without benefit of clergy; and such offence shall and may be inquired of, tried, and determined, either in the county where the offence shall be committed, or where the party shall or may be apprehended."

It should be observed that under s. 3, it is not essential that the letter should contain any thing valuable, or that the party should be at all connected with the Post-Office, both of which are necessary to constitute the offences created by s. 2. In the case of *Rex v. Brown, R. & R. C. C. R. 32, n.*, it was held, that a person who has an employment in the Post-Office may be convicted of stealing a letter under s. 3 of this act.

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second, stating the notes to be the property of *John Folliott Powell*. The fifth and sixth counts were similar to the third and fourth, except that they stated the notes to have been in a packet instead of a letter. The seventh count charged the prisoner with stealing from and out of a certain post-office, situate &c. a certain other letter which had been put into the said post-office, "to be delivered to a certain person at Turvey, in the county of Bedford, to wit, *John Folliott Powell*." The eighth count was exactly the same as the seventh, except that for the words "post-office," the words "place for the receipt of letters," were substituted. The ninth and tenth counts were similar to the seventh and eighth, only charging the thing stolen to be a packet. The seventh, eighth, ninth, and tenth counts did not state the prisoner to have been in the employ of the Post-Office. The eleventh and twelfth counts were common larceny counts for stealing the notes; the former laying the property in *Mr. Folliott*, the latter in *Messrs. Gosling*.

Before the case was gone into, *Denman*, A. G., abandoned all the counts which were framed on the second section of the act of Parliament (a), and relied on those which were framed under the third section of the statute (b), stating that it might be doubted whether a receiving-house was a post-office.

It appeared that *Mr. Abram*, by whom the prisoner had been employed as a servant to clean boots and shoes, &c., carried on the business of a law stationer, at a shop in Middle Temple Lane, that being a receiving-house of the General Post-Office. It also appeared that the prisoner used to assist in tying up and sealing the post-

(a) These were the first six counts of the indictment.

(b) These were the seventh and eighth counts.

office bag. It was proved, that on the 19th of April, Messrs. *Gosling* sent ten bank notes of 10*l.* each, in a letter, addressed, "*J. F. Powell*, Esq., Turvey House, Newport Pagnell;" and one of their clerks stated that he took this letter to Mr. *Abram's* shop, but whether he put it into the letter-box, or gave it to a person in Mr. *Abram's* shop, he was not certain; but he stated the latter to be his usual practice. The letter never reached Mr. *Powell*, and on the 22d of April one of the 10*l.* notes was found in a boot in a room of a house opposite to Mr. *Abram's* shop in Middle Temple Lane, in which it was the prisoner's duty to clean the boots and shoes of Mr. *Abram* and his family. This note the prisoner acknowledged having put into this boot.

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*C. Phillips*, for the prisoner. The Attorney-General has admitted that those counts of the indictment which charge the prisoner as a servant of the Post-Office cannot be sustained. My first objection as to the rest of the case therefore is, that there is a variance between the indictment and the evidence. It is proved that the letter was addressed to Mr. *Powell* at Turvey House; now the indictment states it to be Turvey, and not Turvey House.

*Denman*, A. G. The eighth count states that the letter was to be delivered to a certain person at Turvey, in the county of Bedford, to wit, *John Folliott Powell*.

Mr. *Powell*, being recalled, said that his house was called Turvey House, and that it was in the parish of Turvey, but that it was about a quarter of a mile from the village of that name.

LITLEDALE, J.—Suppose a letter directed No. 1,

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New Square, Lincoln's Inn; would it not be sufficient to state that it was to be sent to Lincoln's Inn?

*C. Phillips.* The next objection is, that this is charged as the stealing of a letter out of the receiving house. Now, I take it that nothing is more clear, than that the removal from the house must be complete; and if the jury should think that the prisoner opened the letter in Mr. *Abram's* shop, and stole the contents, that will not be enough. This is like the case of *Rex v. Thompson*, where it was held that, to constitute a stealing from the person, the removal of the property must be complete; although, to constitute a simple larceny, the smallest removal is sufficient (*a*).

LITLEDALE, J.—This is a question that must be left to the jury.

*C. Phillips.* There is a third objection. To constitute this offence, it is essential that the letter should have been put into the post. Now, here, the witness

(*a*) In the case of *Rex v. Walsh*, R. & M. C. C. R. 14, the prisoner had lifted up a bag from the bottom of the boot of a coach, but was detected before he had got it out. It did not appear that it had been entirely removed from the place it had at first occupied in the boot, but the raising it from the bottom had completely removed each part of it from the space that specific part had occupied. This was held to be a sufficient asportation to constitute a *simple larceny*. In the case of *Rex v. Thompson*, R.

& M. C. C. 78, which was an indictment for larceny *from the person*, the prosecutor had secured his pocket-book in an inside front pocket of his coat; he felt a hand between his coat and waistcoat, and his pocket-book was just lifted out of his pocket, when he forced the book down again into his pocket. This was held to be not enough to constitute a *stealing from the person*, but was sufficient to constitute a *simple larceny*, and judgment was given accordingly.



does not know whether he did not go into the shop, and give it into some person's hand ; and I contend that unless the letter found its way into the letter-box or letter-bag, it will not be sufficient.

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LITLEDALE, J.—If the banker's clerk took the letter and laid it on Mr. *Abram's* counter, or if one of the persons belonging to the shop received it into his hand, I think it is enough ; I look on the whole room as the place for receiving letters, and not the mere box.

The prisoner was called on for his defence.

LITLEDALE, J. (in summing up)—I think that there is no evidence to shew that the prisoner was a servant of the post-office ; and it also appears to me that this place was not a post-office within the meaning of the act of parliament, but that it was a place for the receipt of letters. In these receiving houses there is always a letter-box ; but if a person chuses to go into the shop, and lay his letter down on the counter, I think that is sufficient to satisfy the act of parliament, as I consider the whole shop as the “ place for the receipt of letters.” This, therefore, would support the eighth count of this indictment. There was also an objection raised, that the indictment stated that this letter was to be delivered at Turvey, whereas the direction upon it is Turvey House. We think that there is nothing in that objection ; for if it is to be delivered at Turvey House, that is a delivery at Turvey, as Turvey House is in the parish of Turvey. Another objection was, that there is no evidence that the prisoner ever took the letter out of the shop. That, I think, is a question for your consideration. Before you can convict the prisoner upon the eighth count of this indictment, you must be satisfied

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that he took the letter out of the shop: you will therefore consider whether he opened the letter in the shop, or whether he took the letter out of the house to the room in the other house, in which he cleaned shoes, and opened it there. One would think he would hardly have opened the letter in Mr. *Abram's* shop, where he might have been seen, when he could so easily have taken it to the other house, and have opened it so much more privately. With respect to the notes, you will consider whether the prisoner stole them. With reference to this, we find that he used to assist in tying up the letter-bag, and that shortly afterwards he put one of the notes into a boot. If you think he stole the notes, you must at all events find him guilty of the larceny; and then you must consider whether he opened the letter in Mr. *Abram's* shop, or whether he took the letter out of the shop and opened it elsewhere; and, if the latter, it will be your duty also to convict him of the other part of the charge.

Verdict—Guilty of stealing the 10*l.* note which was found in the boot, and not guilty of the residue of the charge (*a*).

It being afterwards ascertained that the eleventh and twelfth counts did not conclude—"against the form of the statute,"

LITTLEDALE, J., said that the judgment must be respited (*b*).

(*a*) Counsel for the prosecution, *Denman*, A. G., *Gurney*, *Shepherd*, and *R. Scarlett*; for the prisoner, *C. Phillips*.

(*b*) Where the stealing was no felony at common law, but is made so by statute, it is neces-

sary that the indictment should conclude *contra formam statuti*; but where the offence was a felony at common law, and a statute merely increases the punishment, as in the cases of horse-stealing, sheep-stealing, and the

like, it is unnecessary. See Jerv. Arch. Cr. Law, 52. The stat. 7 Geo. 4, c. 64, s. 20, enacts that no judgment upon any indictment or information for any felony or misdemeanour shall be stayed or reversed "for the insertion of the words 'against the

form of the *statute*' instead of the words 'against the form of the *statutes*,' or *vice versa*." That, therefore, would be only an objection upon demurrer; but this enactment does not extend to cases where the *contra formam statuti* is omitted altogether.

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JONES v. SIMPSON and DERBYSHIRE (a).

**TRESPASS** against the two defendants, a magistrate and constable, for assault and false imprisonment.

At the trial, before *Park, J.*, at the last Summer Assizes for the county of Stafford, it appeared that the notice of action against the defendant *Simpson*, the magistrate, stated that the plaintiff would sue out a writ of quo minus against him, without noticing the other defendant. Shortly after the month (after the service of notice) had expired, the plaintiff sued out a quo minus against the defendant *Simpson* alone, which he in a few days abandoned, and then commenced the present action, by suing out a quo minus against the two defendants. A verdict passed for the plaintiff, with leave for the defendants to move to enter a nonsuit.


Notice of action against a magistrate, under 24 Geo. 2, c. 44, is sufficient to warrant a writ, and proceedings against him and a constable jointly.

Notice was given to a magistrate, as above, and a writ sued out against him alone, which the plaintiff afterwards abandoned, and sued out another against the magistrate and constable jointly:—Held, that the notice was sufficient to warrant the second writ, and proceedings thereon.

In the commencement of this term, *Taunton* accordingly obtained a rule *nisi*. He contended that the notice of separate process was not sufficient to maintain an action commenced by joint process; and he distinguished *Agar v. Morgan* (b), as being upon an act of parliament which required a notice of action only; whereas, in the

(a) This and the following from Crompton and Jervis's Exchange Reports.

(b) 2 Price, 126.

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present case, notice of the intended writ or process is to be given, according to the decision of the Court of King's Bench in *Lovelace v. Curry*(a). He argued that the authority of *Bax v. Jones*(b) was not to be relied on, because that case proceeded entirely upon the authority of the case of *Agar v. Morgan*, and the circumstance of the latter case being upon a different act of parliament was not adverted to. He contended also that great mischief might arise, as in such case the magistrate might lose his opportunity of making a tender, as he might very likely think that he had a good defence to the action to be founded on the first writ, by the evidence of the constable, and therefore might reasonably refrain from making a tender, and then his expected defence would be taken away, by the constable being joined in the second action; whereas, if he had originally had notice of a joint action, he might have tendered amends, knowing that he could not prove his defence without the evidence of the constable. He contended also that where a writ had been sued out conformably with the notice, the notice became *functus officio*, and then there was no notice to support the second writ.

*C. Phillips* and *Whitcombe* now shewed cause. The notice in this case contained all the requisites which the statute 24 *Geo. 2* requires; there was a notice in writing of the intended writ or process, which notice also explained the cause of action, and could not mislead the magistrate, in the manner suggested, as all trespasses are in their nature joint as well as several. But there are three express authorities on this point. *Agar v. Morgan* was attempted to be distinguished, because the act of parliament in that case required a notice of the cause of action only. It is impossible to say that there

(a) 7 T. R. 631.

(b) 5 Price, 168.

is a misdescription in the one case if not in the other. If notice of a several cause of action is not a misdescription of a joint cause of action, can it be said that notice of a several writ or process is a misdescription of a joint writ or process? Any difficulties as to tendering amends must apply equally to both cases. It is to be observed also that this Court, in *Agar v. Morgan* proceeded on the ground of the law being as now contended for on behalf of the plaintiff with regard to the statute 24 Geo. 2, for they adopted the reasoning of the counsel who argued from the analogy of that case to cases of notices to magistrates, under 24 Geo. 2; and Mr. Baron *Richards* says—"I am materially guided by the consideration that a constable may be joined in an action against a justice of the peace, (who is entitled under 24 Geo. 2 to notice of the writ and cause of action,) although the intention of joining the constable be not expressed in the notice." *Bax v. Jones* is also an express authority; and the case of *Ferguson v. Sir William Addington* is there said, by Mr. Baron *Garrow*, to have decided the same point. *Robson v. Spearman*(a) is also an authority; for, although the objection was not noticed by the Court in their judgment, it was distinctly urged by counsel, as one ground for granting a rule to enter a nonsuit, which the Court refused.

*Russell*, Serjt., and *R. V. Richards*, in support of the rule. When the notice was followed, immediately after the expiration of the month, by a writ in conformity with such notice, it became functus officio, and could not afterwards support a second writ. The magistrate, when the first writ was abandoned, had a right to suppose that the plaintiff intended to drop his proceedings, and had no need to tender amends. If the plaintiff

(a) 3 B. & A. 493.

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could sue out two, he might sue out any number of writs upon one notice. The statute intends that every writ sued out should be grounded on a notice. If a second notice had been given, to which the magistrate was entitled, to support the second writ, he would probably have tendered amends.

BAYLEY, B.—The question in this case is whether, under the statute 24 *Geo. 2*, c. 44, a plaintiff is tied down to the first writ which he sued out after the notice of action, in a case where he has afterwards sued out a second writ ejusdem generis, and substantially for the same cause of action; and I am of opinion that he is entitled to avail himself of such second writ, provided it be warranted by the notice. The statute provides that a notice in writing shall be given of the intended writ or process, in which notice shall be specified the cause of action. Now what is the meaning of the words intended writ or process? It seems to me that if the writ correspond in character with that which is described by the notice, it is such a writ as the party may proceed upon, notwithstanding there may have been a prior writ sued out; and I think that the words, intended writ or process, ought not to be construed to attach themselves to any one individual writ only, but to one of the nature and character described in the notice.

It has been objected that the right of tender given to the magistrate by this statute, might be affected by allowing the plaintiff to abandon his first writ, and sue out a second; but the defendant, in such case, has every benefit which the legislature intended; and he has something more, for he has an additional opportunity and time. The circumstance of there being two writs, deprives the party of no benefit, but enlarges the time for making the tender; and in my mind, it would be a

narrow construction to hold that the intended writ or process means the writ or process first sued out. We ought not to put a forced construction upon a provision which goes to restrain the general right which a plaintiff has to sue; for, whenever an act of parliament is to be construed, which is to restrain such general right, it ought to be construed strictly, though not, however, in such a manner as to contradict the spirit of the statute.

The second question which has been raised is, whether, if you state in the notice your intention to sue out a writ against a magistrate, you are at liberty to sue one out against the magistrate and constable jointly. Finding that decided in no less than three cases, I think it is not a point which we are at liberty to consider as open to discussion; I say three cases, because it is impossible to distinguish *Agar v. Morgan* from the present case. If a cause of action against one is no less a cause of action against him because it is a joint cause of action against him and another, then a writ against one is no less a writ against him, because it is a joint writ against him and another. Besides, in that case, though it was decided on a different act of parliament, the Court illustrated it, and their judgment proceeded on the analogy to cases under the statute 24 Geo. 2. Then comes the case of *Bax v. Jones*, which is distinctly in point. The next case is *Robson v. Spearman*, in which the Court of King's Bench were of opinion that such a notice was sufficient. I therefore think that this rule must be discharged.

GARROW, B.—In the case in 5 *Price*, the Court were called upon to review their decision in *Agar v. Morgan*, and their judgment proceeded upon full consideration.

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VAUGHAN, B.—The question is whether this act of parliament has been complied with. The act requires a notice in writing, of the intended writ or process, and of the cause of action. In looking over the cases on this subject, I cannot help expressing my opinion that the refinement in favour of magistrates in some of those cases has been pushed to an extent beyond what a reasonable construction of the statute requires. The act was meant for the protection of public functionaries, but we must take care that justice be not entangled by the very nice distinctions on this subject. All trespasses are in their nature joint as well as several, and there is nothing in this notice to require the action to be separate, or to mislead the magistrate in this respect. In principle and reasoning, the case of *Agar v. Morgan* is precisely similar to the present. *Bax v. Jones* is in point; and in *Robson v. Spearman* this point was distinctly taken at the bar, and the Court refused a rule to shew cause, though they did not notice it in their judgment. On principle, authority, and common sense, I think that the act of parliament has been complied with by the notice in question, and that this rule must be discharged.

BOLLAND, B.—I perfectly agree with the rest of the Court that this rule should be discharged. In *Robson v. Spearman*, it appears that counsel distinctly put the very point, and the attention of the Court was called to it; and though they did not find it necessary to advert to it in their judgment, they must have taken it, as well as the other points in the case, into their consideration. But the other cases proceeded on full argument. For the reasons given by my learned brothers, and on the ground that the cases cited have decided the point in



question, I fully concur with the rest of the Court in thinking that this rule should be discharged.

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Rule discharged.

**The ATTORNEY-GENERAL v. SIDDON.**

**INFORMATION** for penalties. The second count of the information charged, that the defendant harboured and concealed tobacco, the duty thereon not having been first paid; and the seventh count charged, that the defendant used and employed a certain permit for another purpose than to accompany the goods for which it had been obtained and granted.

A trader, concealing smuggled goods, is liable for the act of his servant in protecting such goods, though done in his absence.

At the trial, before *Alexander*, L.C.B., at the Middlesex sittings after Easter term, the following appeared to be the facts of the case:—An excise officer, upon making his survey, discovered upon the premises of the defendant a quantity of tobacco, for which he requested to see the permit. The servant of the defendant, who managed his business, said, that he had a permit, and should be able to find it, if it were not in the desk, which was locked up. In fact, there was no permit for this tobacco; but the servant sent a boy and obtained a permit for the removal of tobacco from the stock of S. & Co. to the stock of the defendant, which he produced to the excise officer, as the permit for the removal of the tobacco discovered. This permit was for the removal of a different description of tobacco, and was granted, as appeared by the date, after the discovery was made by the excise officer. At the time of this discovery, the defendant was from home, and had been absent for some time pre-

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viously. Upon these facts, it was contended, that this being in the nature of a criminal proceeding, the defendant was not liable for the act of his servant, unless the act was done with his knowledge and privity, of which there was no evidence; but the Lord Chief Baron told the jury, that the defendant was liable for the act of his agent in the conduct of his business; and the jury, under this direction, found a verdict for the crown, upon the second and seventh counts.

In Trinity term, *Jervis* obtained a rule to enter a verdict for the defendant, on the seventh count, or for a new trial; against which—

*Clarke* and *Walton* shewed cause. An information for penalties is not strictly a criminal proceeding, but is in the nature of a civil remedy, to recover a debt due to the crown. In a case like the present, therefore, the master is answerable for the act of his servant, done in the conduct of his business, although it may be admitted that, for a felony, he would not be liable. There are many authorities for the liability of the principal in such cases. Thus, a master may be charged in trover for a conversion by his servant, *Mead v. Hammond*(a), although the servant is also liable, *Stephens v. Elwall*(b); and a sheriff is liable for the act of his officer: *Brown v. Compton*(c). In a late case, *Rex v. Gutch*(d), this doctrine was fully discussed. That was an information for a libel in a newspaper, and, it appearing that the defendant never interfered in the management of the paper, and was, at the time of the publication, at a distance of more than 100 miles from London, where the paper was published, it was contended that he was not liable for

(a) Stra. 505.

(b) 4 M. & S. 259.

(c) 8 T. R. 424.

(d) M. & M. 433.

the act of his agent. But Lord *Tenterden* was of opinion that a person who derives profit from, and furnishes the means for carrying on a concern, and intrusts the conduct of it to one whom he selects, and in whom he confides, is answerable for the act of that agent: and the defendant was found guilty. So, here, the act is done in the business of the defendant, from which he derives a profit, and by a person selected by him, and in whom he confides. To hold the defendant irresponsible, would be to paralyze the revenue laws, for, if absence were an excuse, no penalty could ever be enforced, and the laws might be evaded with impunity.

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*J. Jervis*, contrà. The argument of inconvenience cannot apply, for the party who does the act is responsible, and by proceeding in rem the goods are forfeited. Strictly speaking, this is not a criminal proceeding; but it is in the nature of a criminal proceeding, inasmuch as no new trial can be granted after a verdict for the defendant, and therefore it must be regulated by the same rules as if it were strictly a proceeding of that nature. Now it must be admitted that, in a civil proceeding, a principal will be answerable for the act of his servant, done in his master's employ; but even this is subject to this limitation, viz., that a master is not liable for an act done wilfully by his servant. *M'Manus v. Crickett* (a), *Boucher v. Noidstrom* (b), *Croft v. Alison* (c). Nor is he liable for an act done by the servant exceeding his authority, either expressed or implied. Thus, if "I command my servant to distrain, and he ride on the distress, he shall be punished, and not I." *Noy's Maxims*, c. 44. A sheriff is liable for the act of his officer, upon grounds of public policy, and a proprietor of a newspaper is liable for a publication by his editor, upon grounds of public expediency, and because where the conduct of the paper

(a) 1 East, 106. (b) 1 Taunt. 568. (c) 4 B. & A. 590.

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is wholly intrusted to the editor, every publication is within the scope of this general authority, and a particular authority is presumed for the particular publication. But there is no case in which a master has been held liable for the act of a servant, who quits sight of the object for which he is employed, and, without having in view his master's orders, does that which his own malice and his own will suggest. In a case like the present, an authority cannot be presumed for an act which is illegal, and certainly the master can only be liable upon a finding by the jury that the servant had authority, either express or implied, to do the act. In *Rex v. Gutch*, the question of authority was left to the jury, and the same course ought to have been adopted in this case. But if this be viewed strictly as a criminal proceeding, it is clear that the defendant will not be liable. The rule of the criminal law is, that he only is liable who does the act, or procures it to be done. *Rex v. Huggins (a)*. No authority can be presumed; and if the agent wilfully commit an act varying in substance from the instigation, or the same act upon a different object, the principal will not be liable. There are cases in which a master has been held liable for the acts of his servant in selling articles in which his master deals, and in the manufacture of articles which the master himself is presumed to make. Such was the case of *Rex v. Dixon (b)*, in which the defendant was indicted for mixing crude alum with bread; and it appeared that the alum in question was mixed by the foreman of the defendant, and that, if diluted and used in moderate quantities, it was innoxious; but the Court held that the defendant was liable. In that case, it did not appear clearly that the defendant was ignorant of the act of his servant; but, on the contrary, he knew that a certain quantity of alum was used; the servant,

(a) 2 Ld. Raym. 1580.

(b) 3 M. & S. 11.

therefore, had authority to do the act: and, in selling the articles of his master's trade, a servant has also an authority, for he acts within the ordinary scope of the general authority received from his master.

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*Clarke*, in reply. The distinction between the liability of a master for the act of his servant, in a civil and criminal proceeding, is well understood. If the servant of a chemist sell poison in his master's shop, by mistake, and the purchaser take it and die, the master is not liable; but if the purchaser take it and recover, the master is liable in a civil action for the negligence of his servant.

*Cur. adv. vult.*

ALEXANDER, L. C. B., (after stating the pleadings and facts of the case,) proceeded thus:—

The objection to the conviction which took place in this case was, that the master, the defendant, did not appear to have taken any personal share in the transaction, and the controversy was, whether he was liable in these proceedings for the act of his servant. It is my opinion that he was liable. The second count, on which the defendant was also convicted, was for harbouring and concealing this tobacco. There was no evidence to warrant the conviction upon that count, except that the tobacco was found on the premises of the defendant. It is an occurrence of every day to convict upon such evidence, and if the rule were otherwise, the laws would be completely inoperative. It is always competent to the defendant to prove his innocence if he can, but the finding is *primâ facie* evidence upon which these convictions proceed. If he does not prove his innocence, the law presumes his guilt from the fact of the goods being found concealed upon his premises.

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Now, it appears to me, that for the same reasons and upon the same principles, whatever a servant does in the course of the employment with which he is intrusted, and as a part of it, is the master's act. The legal presumption is so, unless the contrary be shewn. It is the presumption that the master authorised it.

This is admitted to be true, as far as civil liability goes; but it is argued that it is not true as to criminal or penal consequences. How far this rule may extend in criminal proceedings, I will not upon this occasion presume to say, but, to a certain extent, it unquestionably has been applied to criminal proceedings. The cases of *Rex v. Dixon*, and *Rex v. Gutch*, are of that description.

In the case of *Rex v. Dixon*, it appeared that alum, though prohibited, was no unhealthy or mischievous thing, if mixed in a particular form, and if properly mixed; but that, if it was done imprudently or inadvertently in a crude state, it was extremely mischievous; in which state it had been mixed in that case. No doubt the master had authorised its mixture, but he had probably intended that it should be mixed in the proper way of mixing it, so as not to be mischievous, although even then it is a breach of the law; but he was indicted and convicted, and, I believe, punished, upon the principle of being liable for the act of his servant.

It is not necessary for me, however, upon the present occasion, and for the present purpose, to say how far this principle might extend, for I think it quite clear that it extends to this case. The provisions of the legislature would be inefficacious, if the master, for whose benefit the operation is intended, were to escape those penalties which the legislature has imposed, where the act was done in pursuance of the general purpose, which

the servant was undoubtedly authorised by the master to carry into effect. It is evident, that all those provisions would, but for this construction, be unavailing.

The argument, in some measure, proceeds upon a notion that this is a criminal proceeding. For some purposes, unquestionably, this proceeding has received a narrow construction, because it resembles, in some respects, a criminal proceeding; but, on the other hand, it is said to be a civil demand of the crown. Without entering into that question, I think that the doctrine of responsibility applies to this case, and that the demand of the crown would in very few instances be effectuated, if it were understood that the master was not liable for the conduct of his servant. Then a man of straw would be put up, and the real person who was to derive the benefit, and who could alone be effectually subjected to the demand on the part of the crown, would escape. I think, therefore, that the conviction upon the seventh count is perfectly right, and that the rule must be discharged.

BAYLEY, B.—I am of the same opinion with the Lord Chief Baron. In the first place, I consider this as being not properly a criminal proceeding, but a civil proceeding, for the purpose of recovering that which is a debt due to the crown. It is a penal proceeding. An action to recover the amount of penalties for giving receipts on unstamped paper is a penal proceeding. But I do not consider that as being a criminal proceeding. But whatever the nature of this proceeding is, whether penal or merely civil, this is a case in which, to my mind, the act of the servant is to be considered as being an act done in the master's business, and within the scope of the authority probably given by the master to the servant.

This is not the ordinary case of a servant selling in his

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master's shop the articles in which the master deals, in which it is quite clear that he is acting within the ordinary scope of the authority which he has received from his master, and therefore that the act of the servant in making the sale is the master's act; upon which principle all the cases of libel have gone; *Rex v. Almon* (a), *Rex v. Gutch* (b). In those cases, the act of the servant was considered as being the master's act.

Neither is this the case of an act done by a servant in the manufacture of articles which the master is himself to manufacture. There the servant is merely acting in the business of the master, and within the scope of the authority which he actually receives from his master. The authority which he receives from his master is an authority to make and manufacture, and the master is responsible for his conduct *primâ facie*, as to the means he adopts in making and manufacturing.

But this is a case certainly of a different description, and I agree with the distinction that was taken when it was argued, that this does not fall within the ordinary range of the cases of a servant's act being the master's act. But, in order to form a judgment, whether this is the master's act or not, and within the scope of the authority which ought to be considered as given by the master to the servant, we must look at the nature of the act, and see with what view that act was done, and the participation which the master had in any thing to which that act referred.

This is the case of a servant of a fraudulent master, endeavouring, by his own act, to conceal his master's fraud, and to prevent the consequences which would otherwise fall upon the master in respect of that fraud. From the nature of the act in which the servant is employed, and from the conduct of the master in his fraud,

(a) 5 Burr. 2686.

(b) M. & M. 433.



we must decide whether or no the servant had *primâ facie* an authority from the master; not, perhaps, specifically, for the doing of this specific act, but for the purpose of doing that which, in the exercise of his discretion, upon a moment of embarrassment which the possession of an improper article might naturally create, the servant should think and deem to be best.

In this case, the master has upon his premises certain goods, which are unlicensed; they are there without a regular permit; a detention of these goods would bring upon the master loss of character, and, to a certain extent, would bring upon him loss of property, and subject him to pecuniary penalties. Under these circumstances, the master, having full knowledge that the things were there, (for we are bound to consider that as an ingredient in the case), and knowing what the consequences of their detection would be, what, in the course of such a business so illegally carried on, is the authority which we must naturally expect to be given by the master to the servant? I cannot conceive that it would be any thing short of this: "Do what you can to save my character; do what you can to save my property: do what you think reasonable for the purpose of protecting me from the penalties which will follow detection." Has the servant any purpose of his own to answer? None. In the conduct he pursues, he acts not for his own benefit, but for the benefit of his master. It matters not to him whether the articles are seized or are not seized. When a servant is concerned in an illegal trade of this description, it is clearly for the benefit of the master. The servant runs a great personal risk, and why? It can only be with a view to protect his master. When, in the case of a master sanctioning and carrying on an illegal traffic of this description, the servant adopts means which are calculated to save the master, and which can have no

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other object, it seems to me that, *primâ facie*, the act which the servant adopts for the purpose of saving the master ought to be considered as an act done by him in the service of such master, for the benefit of such master, and within the probable authority which the master gives to the servant with reference to articles of that description. It is upon this ground that I think there was *primâ facie* evidence to charge the master with the act of the servant in this particular case, so that the act of the servant was to be deemed the master's act, and within the scope of that authority, which it was likely the master would give with reference to articles of that description. We must always form our judgment of the extent and nature of the authority which the master confers upon his servant, by the nature and character of the business in which the servant is to be from time to time employed.

I am therefore of opinion, that, in this case, there was *primâ facie* evidence to shew, that the act of the servant was the act of the master. The master was certainly at liberty to have produced evidence for the purpose of rebutting that *primâ facie* case; but, in the absence of any evidence to rebut that case, I am of opinion, that it was rightly left to the jury, and that the jury were bound to consider it as being the master's act, and that, consequently, the verdict on the seventh count is right.

GARROW, B.—The case of *Rex v. Dixon* is to my mind decisive of the present. The extent of the authority can only be gathered from the circumstances of each case; and when the master is found in the possession of illegal goods, the act of the servant, for the protection of those goods, with no personal object in view, is, in my opinion, *primâ facie*, the act of the master.

VAUGHAN, B.—I entirely concur, not only in the decision which the Court have come to upon this question, but in the reasons which have been given for that decision. I agree, that, in order to fix a party with the penalties of the statute, it is necessary that the jury should be satisfied, by reasonable evidence, either that the party accused himself did the illegal act charged with respect to the permit, or that he caused it to be done by the instrumentality of the servant, who may have authority for that purpose, either expressed or implied, actual or constructive. Now no arguments have been addressed to the Court to shew that the defendant was improperly convicted on the second count, which imputes to him the offence of harbouring and concealing these goods; and the admission, that he was properly convicted upon that count, seems to me to put an end to this question, because, upon that conviction, the reasonable presumption arises, that the shopman was authorised by the master to do the act upon which the conviction upon the seventh count proceeded. The master was not present when the goods were deposited, nor was the master present when the permit in question was fraudulently obtained; and therefore, if the absence of the master from the premises were to raise a presumption in his favour in this instance, it would equally apply to the other count. But it is admitted, that he is properly charged with fraudulently harbouring and concealing, and that this was an act done in order to cover the property, in endeavouring to get a permit applicable to that property. Therefore it seems to me that the jury were perfectly warranted upon this evidence, which was *prima facie* evidence, liable to be repelled by other evidence which might contradict the presumption, in finding the defendant guilty upon the seventh count. I think this evidence

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was sufficient to raise the presumption that it was the act of the defendant. This is not, properly speaking, a criminal proceeding; and therefore the distinction taken between criminal and civil proceedings does not apply. This is in some measure a penal proceeding, but it is not a criminal proceeding.

Rule discharged.

END OF TRINITY TERM.

**C A S E S**  
IN THE  
**COURT OF KING'S BENCH,**  
FOR THE USE OF  
**Justices of the Peace.**

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**MICHAELMAS TERM, 1829.**

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UPON an appeal against an order of two justices, whereby *William Stokes*, his wife and children, were removed from Huttoft to Willoughby-with-Sloothby, in the parts of Lindsey, in the county of Lincoln, the Court of quarter sessions confirmed the order, subject to the opinion of this Court upon the following case:—

An estate in remainder, though vested, will not confer a settlement.

The pauper being settled in Willoughby-with-Sloothby, *John Neal*, by indentures of lease and release of the 19th and 20th of March, 1825, in consideration of 105*l.*, conveyed a parcel of land and two unfinished dwelling-houses, situate in Huttoft, to the use of *Elizabeth Stokes* for life or widowhood, remainder to the use of the pauper in fee. The 105*l.* was money which had been bequeathed by the father of the pauper to him absolutely, the interest of which the pauper had subsequently by his deed, in consideration of natural love and affection and 10*s.*, settled upon his mother for life or

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widowhood, the principal, after her death, to be paid to himself. A further sum of 50*l.* was expended by the pauper, after the execution of the conveyance, in finishing the dwelling-houses, which sum had been bequeathed by the pauper's father to trustees in trust to pay the interest to the widow during her life or widowhood, and the principal, after her decease or marriage, to the pauper. The pauper paid the interest of the 105*l.* to the trustees, and the trustees paid it over to the mother. The pauper entered upon one of the houses and part of the land at the time of the execution of the conveyance. The mother let the other house and the remainder of the land for the space of one year after the execution of the conveyance, at the expiration of which year the mother told the pauper she would deliver up all the premises to him, and that he might do as he liked with them. The pauper then entered into possession of the other house and land, and let it, and received the rent himself and never accounted for it to his mother, and continued to occupy the same house he had previously occupied until 1828, when both were sold, and were conveyed by a deed, to which his mother, who remained a widow, was a party. The pauper received the whole purchase-money, and did not account for it to his mother. They both joined in the receipt to the purchaser.

*Alderson*, in support of the order of sessions. Unless the pauper had an immediate interest he had no right of residence. In *Rex v. Eatington (a)*, where *A.*, residing upon a cottage of his own, conveyed it by lease and release to *B.*, with a proviso that *A.* should live in and occupy the cottage during his life, it was held, that inasmuch as the proviso reserved to *A.* a life estate, *B.*

(a) 4 T. R. 177.

took only a remainder, which conferred no settlement by residence on the estate. It is immaterial for the present purpose to inquire whether the Court were right in putting that construction upon the proviso. The settlement was disallowed on the ground that the pauper took no immediate interest. The same principle was acted upon in *Rex v. Ringstead* (a). The operation of the will was inquired into for the purpose of ascertaining whether an immediate interest passed. Then this is a purchase; but it does not appear that the pauper has any interest to the amount of 30*l.* It is impossible to determine the value upon the case as it is now stated.

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*N. R. Clarke*, on the same side, referred to the cases of *Rex v. Staplegrove* (b) and *Rex v. Houghton-le-Spring* (c).

*Fynes Clinton*, contra. *Rex v. Eatington* was decided upon another point. It was there assumed to be necessary that the party claiming a settlement by estate should have a right of possession. In *Rex v. Staplegrove*, which was decided afterwards, it was held that it was not necessary that the party should have a right of possession at the time of the residence, but that he gained the settlement being entitled to the reversion only. [*Parke, J.* In that case there were strong grounds to believe that the demise for a thousand years was a mortgage term.] So here, the mother lets the pauper into possession. In *Rex v. Houghton-le-Spring* possession was held not to be necessary. The distinction is, that if the party is in possession as mortgagor, he is in possession by leave and licence of the mortgagee. [*Bayley, J.* In *Rex v. Houghton-le-Spring* the pauper had a present estate of freehold, not what the law calls a reversion.] In *Rex v. Ringstead* the point was not fully considered.

(a) *Ante*, 71; 4 M. & R. 67; 9 B. & C. 218. (c) 1 East, 247.  
 (b) 2 B. & A. 527.

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*Whitehurst*, on the same side. In *Rex v. Houghton-le-Spring*, Lord *Kenyon* says, "it seemed to me to be a most extraordinary proposition to establish that a man might be removed from a parish in which he had property, perhaps, to a considerable amount, but whether more or less in such a case is unimportant, because he has let it out, and that if he afterwards came there again he was liable to be treated as a vagrant. A man, though not in the actual occupation of his own estate, may have many reasons for wishing to live in the neighbourhood of it. He is entitled to the privilege of superintending it, but, according to the doctrine contended for, he may be sent to another part of the kingdom, if his settlement happened to be there."

BAYLEY, J.—A man who has a remainder only has no right to superintend. An estate in remainder expectant upon a prior estate of freehold, is not sufficient to confer a settlement. The party has no means of subsistence out of the actual profits or the rents. *Rex v. Houghton-le-Spring* only shews that if a party has a vested estate of freehold he need not actually occupy. There is a plain line of distinction between this case and those which have been mentioned. The Court cannot look at the quantum of rent, but simply at the immediate estate of freehold. Here the son never had the present estate of freehold.

LITLEDAL, J., concurred.

PARKE, J.—This point was expressly decided, after a very long argument, in *Rex v. Ringstead*.

Lord TENTERDEN, C. J.—I concur in the opinion that an estate in remainder is not sufficient.

Order of Sessions confirmed.



## The KING v. MAINWARING.

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THE defendant was convicted before a single magistrate for the parts of Lindsey, in the county of Lincoln, under the statute 50 Geo. 3, c. 41, of the offence of exposing goods to sale without having obtained a licence. On appeal, the sessions confirmed the conviction, subject to the opinion of this Court upon the following case:

*Zachariah Boyle*, on or before the 21st of October, 1828, was and still is a large china and earthenware manufacturer at Hauley, in Staffordshire. Before the said 21st of October he consigned to Gainsborough, a market town, to his own order, a quantity of china and earthenware, of which the several articles mentioned in the conviction formed a part. The said china and earthenware were conveyed by a carrier's boat from Hauley to Gainsborough, and the said *Zachariah Boyle* was the real worker and maker of all of it, and it was manufactured by him at Hanley aforesaid. *William Mainwaring*, the defendant, was, on or before the said 21st of October, and still is, a servant in the sole employ of the said *Zachariah Boyle*; he resided with his wife and family at Hanley, in a separate dwelling-house, his own freehold, being within three hundred yards of the house and manufactory of the said *Zachariah Boyle*, and never left that place except when employed elsewhere by his master. When at Hauley he superintended and assisted in manufacturing, and was employed by the said *Zachariah Boyle* to sell the before-mentioned china and earthenware at Gainsborough. His salary was a fixed yearly sum, and did not depend upon the amount of any sale which he might effect; nor did he receive any commission or benefit, nor was he liable to any charges or loss whatever which might arise or be incurred in the sale, conveyance, or otherwise, of the said china and

The exemption in 50 Geo. 3, c. 41, s. 23, (the Hawkers' and Pedlars' Act,) in favour of the real worker or maker of goods, &c., or his children, apprentices, and known agents or servants usually residing with him, does not extend to an agent or servant residing in a separate dwelling-house, though solely employed by such worker or maker.

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earthenware, but rendered a regular account of the same to his master, who bore all losses and expenses, and received all the proceeds and profits. The defendant took possession of the china and earthenware so consigned as aforesaid, and upon its arrival at Gainsborough took a room at an inn there, and on the day mentioned in the conviction sold part thereof by public auction. The defendant had no hawker's licence, and had previously been selling at Nottingham and other places.

*N. R. Clarke and Fynes Clinton*, in support of the conviction. The case depends principally on the construction of the 23d section of 50 Geo. 3, c. 41, by which it is enacted, "that nothing therein contained shall extend to prohibit any person or persons from selling any printed papers licensed by authority, or any fish, fruit, or victuals, nor to hinder the real worker or workers, or maker or makers of any goods, wares, or manufactures of Great Britain, or his, her, or their children, apprentices, or known agents or servants, *usually residing with such real workers or makers only*, from carrying abroad or exposing to sale and selling by retail or otherwise any of the said goods, wares, or manufactures of his, her, or their own making, in any mart, market, or fair, and in every city, borough, town corporate, and market town." The case of *The King v. Turner* (a) shews that an agent is within the act. The question for the consideration of the Court is, whether a person who resides in his own house, but whose principal employment is in the house of his master, can be said to be a servant or agent residing in his master's house. By requiring that the servant shall reside under his master's roof, the object of the statute will have been much better secured. If a person who forms no part of his master's

(a) 4 B. & A. 510.

family, may be sent about the country to sell goods in this manner, a great manufacturer may employ hundreds of agents in disposing of his goods in this manner, to the no small injury of the resident tradesmen, by whom the parochial and other local burdens are borne. From these the itinerant vendor is exempted, and it is no great hardship that he should be subjected to the payment of the sum of 4*l.* 10*s.* per annum. The maker or manufacturer himself is exempted; so are his servants in some cases. But the question is, whether the additional words "usually residing with such real workers or makers only," are to have any weight.

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*Denman, Hildyard, and Whitehurst, contra.* The Court will pause before they act upon any supposed advantage to arise from extending the restriction. The exemption ought to have a liberal construction. If the act had contained no specific exemption for servants, it might have been contended that they were within the same protection with their masters. According to all fair construction the defendant was a servant usually residing with the maker. The word "only" shews that the meaning of the legislature was, that the agent should not be a person residing with any other parties as his employers. The act imposes a penalty, and restrains the common law right of trading wherever the party finds it to his advantage to trade. The object of the act being to restrain dealers from going from town to town, the words "usually residing with such workers or makers" must be understood with reference to that object, and are satisfied if the servant resides in the same town with his master. It is not necessary that he should reside in the same house. In 52 *Geo.* 3, c. 108, it is not required that the person vending the goods shall reside with the owner. The object of the

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statute was to confine the exemption to persons who were regularly and bonâ fide in the service of the manufacturer, and to exclude those who were merely constituted servants or agents for the special purpose. Residing in a place does not necessarily mean sleeping there. In 2 *Inst.* 122, Lord Coke says, "If a man hath a house within two leets he shall be taken to be conversant where his bed is, for in that part of the house he is *most* conversant; and here *conversant* shall be taken for *most conversant*." Lord Coke, therefore, impliedly says that a man may be a resident within two distinct leets. So the word "inhabitant" is not always used with reference to the place at which the party sleeps, as in cases upon the Statute of Bridges. The conviction also cannot be supported. [Lord Tenterden, C.J. The case is not before us for that purpose.] This Court has a general authority over the proceedings in inferior jurisdictions where the certiorari is not taken away. [Lord Tenterden, C.J. We must decide merely upon the point which the Court of quarter sessions have reserved for our decision. If the Court of quarter sessions had thought proper to put a question as to the form of the conviction, we should have been authorised to answer it.] It may be contended that even if no case had been reserved by the quarter sessions for the opinion of this Court, the mere circumstance of the party having appealed took the case out of the jurisdiction. But if the Court are to look only at the terms of the special case, that itself contains no statement that the defendant had not obtained a licence. [Lord Tenterden, C.J. The Court of quarter sessions very properly state so much of the case only as is necessary to raise the point upon which they require our opinion.]

Lord TENTERDEN, C. J., after stating the language

of the 23d section, proceeded thus:—The words of an instrument are to be understood according to the subject-matter. Here they are explained by the context. The statute speaks of children and apprentices before it mentions the resident servants and agents. I think, therefore, that it means members of the manufacturer's family. If the construction which has been contended for were to prevail, a manufacturer in London might employ as many agents as he pleased, provided those agents lived on the eastern side of Temple Bar.

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BAYLEY, J.—The defendant had no right of appeal unless it be given by statute. The same clause which gives the appeal takes away the certiorari. The meaning of the legislature must, therefore, be taken to be, that we are to consider the case only with reference to the specific point saved for the opinion of the Court. A point has been raised as to the 52 *Geo.* 3, c. 108, in which act children and servants are omitted. I entirely agree with Lord *Tenterden*.

LITLEDALE, J.—I am of the same opinion. The word resident refers to the place where the party sleeps; that is so in all cases of settlement law. The position cited from Lord *Coke*, instead of assisting the defendant, seems to be rather the other way. In a late case (*a*) of an indictment against a party for not taking upon himself the office of constable, Lord *Tenterden* says, "For all the purposes of pecuniary charge such an occupier is an inhabitant; and therefore he is liable to church rates, to the repairs of highways, and to the repairs of bridges."

PARKE, J.—The only question for the Court is, whether the defendant falls within the description of servant

(*a*) *Rex v. Adlard*, 7 D. & R. 340, 349; 4 B. & C. 772; 3 D. & R. M. C. 416.

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usually residing with the real worker or maker. Taking these words in the sense in which they are commonly used, they mean a person who inhabits and sleeps in his master's house; and this construction is strengthened by the preceding words.

Order of Sessions confirmed.

The KING v. the Inhabitants of ROXLEY.

Where, upon a yearly hiring from the 13th of May, the following 13th of May is excluded from the service by a dissolution of the contract, no settlement is gained, although the service continue 365 days, by reason of its being leap-year.

What shall be a dissolution of the contract, and what merely a dispensation with the service, is a question of fact for the Court of quarter sessions.

UPON an appeal against an order of two justices, whereby *Robert Farmery*, his wife and family, were removed from Roxley to Winterton, in the parts of Lindsey, in the county of Lincoln, the sessions quashed the order subject to the opinion of this Court upon the following case:—The pauper being unmarried, and without children, was hired before old May day, 1819, (13th May,) to serve *James Barrett*, in the appellant parish, from this old May day to old May day, 1820, as a servant in husbandry, at 15*l.* wages. The pauper served *Barrett* in the appellant parish until the 11th of May, 1820, when wishing to visit his friends (fifteen miles distant) and to attend some statutes (*a*) on the 12th of May on the way there, and avoid returning back to his master's, he requested his master's permission to go for altogether, and they settled the pauper's wages, and part was deducted for the time he had to serve. The pauper slept at his master's house, with his permission, on the evening of the 11th of May, and finally left his master's on the 12th (*b*).

*N. R. Clarke*, in support of the order of sessions.

(*a*) Fairs for the hiring of servants; in some counties called "Mops."

(*b*) 1820 was leap year.

A day was wanting to complete the year of service. No settlement therefore was gained in Winterton. Whether the deficient day was caused by a dissolution of the contract or by a dispensation with the service was a question of fact, for the determination of which the Court of quarter sessions was the proper tribunal. That Court has decided, and there were abundant premises to warrant the conclusion to which they have come. If the inference was left to be drawn by the Court above, it was clearly a dissolution and not a dispensation. There is a concurrence of authorities to shew that this was a dissolution. The true criterion is to consider whether the master could still insist upon the service. This is laid down as the test by Lord *Ellenborough* in *Rex v. Rushall* (a). [*Bayley, J. Rex v. Hardhorn with Newton* (b) proceeds upon the same distinction.]

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*Fynes Clinton*, on the same side, was stopped by the Court.

*Patteson*, contra. There was a good service for a year, and there was a good hiring for a year. [Lord *Tenterden*, C. J. referred to *Rex v. Ulverstone* (c).] There it was held that service for 365 days was enough, although the hiring was from Whitsuntide to Whitsuntide, and the servant was discharged before the second Whitsuntide, which shews that a service for a year of that extent is sufficient. In *Rex v. Ackley* (d), a service of 365 days, extending over a leap year, was held not to confer a settlement; but there the hiring was clearly insufficient, being from three days after Michaelmas until Michaelmas following, in leap year. The Court, however, seemed to think the service good. [*Bayley, J. If not a good*

(a) 7 East, 471; 3 Smith, 452. (c) 7 T. R. 564.

(b) 12 East, 51.

(d) 3 T. R. 250.

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year as to the hiring, it would not be a good year as to the service. If the servant went into the service on the 1st of March, and left the service on the 29th of February, it would not be sufficient.] No dissolution of the contract is actually found. The pauper had a right in the morning of the 12th of May to go to the statute. [Lord *Tenterden*, C. J. He ceased to be a servant on the 11th.] In *The King v. Potter Heigham* (a) it was held that absence by consent of the master for one day before the end of the year would not defeat a settlement by hiring and service. [Parke, J. What did the sessions find in that case?] The sessions found nothing specifically on the question of dissolution or dispensation. [Lord *Tenterden*, C. J. Here the sessions only submit to this Court whether they lawfully may determine as they have done.]

*Whitehurst*, on the same side. This was not a dissolution of the contract at the time the master and servant separated. In *The King v. Potter Heigham*, though nothing was said as to the finding a dissolution or a dispensation, the judgment of the Court of quarter sessions implied that the contract had been dissolved. Here, if the case be understood to amount to a dissolution, to take effect from the 12th of May, a settlement would be completely acquired. It was not the object of the pauper to quit on the 11th of May, but on the 12th. He merely wished to visit his friends after the statute, instead of going back again. [Bayley, J. It is stated that the pauper slept at his master's house by his permission. No permission would have been necessary if the contract had not been dissolved.] The permission was introduced into the case for the purpose of shewing that the pauper did not sleep at his master's

(a) Burr. S. C. 690; 2 Bott, 316.



house surreptitiously. The master might employ him on the 12th before he went to the statute. [*Parke, J.* Where a bill of exchange is made payable at so many months after date, the calculation is made by calendar months, without reference to their length.] In the case of lapse the half year is computed as half 365 days, without regard to calendar months.

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**LORD TENTERDEN, C. J.**—Whether that which took place between these parties amounted to a dissolution of the contract, or merely as a dispensation with the service, it was peculiarly proper for the Court of quarter sessions to decide. They have considered that what passed amounted to a dissolution. They have acted upon that view of the case in the order which has been made, and we could not interfere even if we thought the conclusion at which they had arrived to be erroneous. When a leap year occurs, a year must be understood to mean 366 days.

**BAYLEY, J.**—The statute 24 *Geo.* 1, c. 23, s. 2, speaks of bissextile, or leap year, consisting of 366 days (*a*).

The other judges concurred.

#### Order of Sessions confirmed.

(*a*) There appears to be no more reason for designating as a year a period of 365 days, which falls short of a complete revolution of the earth in its orbit, than a period of 366 days, which exceeds it.



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## SHARP v. ASPINALL and PARKER.

The proceedings upon the complaint of a member of a friendly society under 49 Geo. 3, c. 125, s. 3, must be *all* before two justices resident in the county in which the society is held.

**DECLARATION** in trespass. The first count stated that defendants, being justices of the county of York, unlawfully issued their warrant to the constable of Slaidburn, authorising him to levy the sum of 7s. 6d. by distress and sale of the goods, chattels and moneys, of a certain friendly society called The Humane Charitable Fraternity, held at Slaidburn in the West Riding of the county of York, and in default of such distress being found, then to levy the said sum of 7s. 6d. by distress and sale of the goods, &c. of plaintiff, therein described as an officer of the said society; under which warrant defendants with force and arms broke and entered the house of plaintiff in the said county, and took away a writing desk of plaintiff of the value of 10*l.* and sold it, although defendants had no jurisdiction over the subject-matter of the complaint on which the warrant was grounded, and had no right to issue the warrant. Second count for breaking and entering plaintiff's house, and taking away his goods. Third count for taking away plaintiff's goods. Pleas: first, not guilty. Secondly, that before and at and after the said time when &c., one *A.* was a member of the said friendly society, held &c., called &c., the rules, orders, and regulations whereof had been and were, before &c., duly exhibited, confirmed and filed at the general quarter sessions of the peace in and for the said West Riding, according to the provisions of the statute 33 Geo. 3; and the said *A.* so being such member &c., did before &c., complain to defendant *Parker*, being then and there a justice of the peace for the said west riding, *and residing within the same*, and also a justice of the peace for the county palatine of Lancaster, the said county palatine adjoining the said West Riding, of relief having been refused to

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him the said *A.* by the said society, to which he was lawfully entitled; that a summons was issued to plaintiff as steward of the said society; that defendant *Parker* being such justice as aforesaid, and defendant *Aspinall* being a justice of the peace for the said West Riding, and also for the said county palatine, and residing in the said county palatine, near to *S.*, attended at the time and place mentioned in the summons; that plaintiff made default; whereupon service of the notice was proved on oath, and defendants proceeded to hear the complaint, and made an order that the said sum of 7s. 6d. should be paid to *A.*; and because plaintiff refused to pay, defendants issued their warrant, &c. Replication; de injuriâ suâ, &c. At the trial before *Bayley, J.* at the last York assizes, the facts were proved as stated on the record. It was contended on the part of the plaintiff that the defendants, not being both resident in the West Riding, had no jurisdiction to make the order upon which the warrant was founded, inasmuch as the statute 49 Geo. 3, c. 125, s. 1, confined the power of making such orders to two justices "residing within the county, riding, division, &c., within which such society shall be held." On the part of the defendants it was contended, that the clause of the statute referred to was only directory, and that the order being made by two justices of the West Riding, though not both of them resident within it, was good, inasmuch as the statute 28 Geo. 3, c. 49, empowered justices to act for any two adjoining counties, provided they were personally resident within one of them. The learned judge was of opinion that the defendants had no jurisdiction to make the order, and directed the jury to find a verdict for the plaintiff, but gave the defendants leave to move to enter a nonsuit.

*Wightman* now moved accordingly. It was assumed

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at the trial that the order in question was made under the authority of the *first* section of the 49 *Geo. 3*, c. 125, and the objection was founded upon that assumption. Now that was a mistake, for the whole of the proceedings were taken under the *third* section of that statute, which, as regards the present question, is essentially different from the first. The powers given by the first section are, no doubt, confined to justices residing within the county in which the society is held; for the words "such justices" in the latter parts of that section can only refer to the justices there first mentioned, namely, resident justices; and if the proceedings had been taken under that section, it may be admitted that the objection would have been fatal, notwithstanding the statute 28 *Geo. 3*, c. 49. But the subject-matter of these proceedings was *relief*, a word not to be found in the first section, and the whole scope and object of the two sections differ; for the first empowers justices to enforce the obedience of the members to the rules of the society, and the third empowers them to give relief to the members of the society against the misconduct of the officers. The third section begins by enacting that "if complaint shall be made to two *such justices* by a member of relief having been refused, it shall be lawful for the *said two justices residing within the county in which the society shall be held*, and *such justices* are thereby required, to summon the officer against whom complaint shall be made, and, upon his appearance, &c., *such justices* shall proceed," &c. Now the words "such justices" in the beginning of this section cannot be taken to refer to the justices mentioned in the first section, because there is an intervening section, the second, which contains a long recital of two prior statutes, introduces a new set of enactments wholly independent of the first section, and twice mentions "justices," generally, without any

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definite description. Then, taking the words "such justices" in the third section to refer to the last antecedent justices, namely, those mentioned in the second section, which is the proper rule of construction, the complaint of relief being refused may be made to *any* justices, who would have jurisdiction wherever resident; and the subsequent words in the third section, respecting residence, must be considered as directory only, and not restrictive. At all events those words, even if considered as restrictive, can apply only to the granting of the summons; and as the summons in this case was granted by the resident justice, the proceedings will still be valid by the 3 *Geo.* 4, c. 23, s. 2, which provides, "that in all cases where two justices are authorized and required to hear and determine any complaint, one justice shall be competent to receive the original information or complaint, and to issue the summons or warrant requiring the parties to appear before two justices; and after examination upon oath into the merits of the complaint, and the adjudication thereupon by any such two justices being made, all subsequent proceedings to enforce obedience thereto may be enforced by either of the said justices, or any other justice for the same county."

LORD TENTERDEN, C.J.—I entertain no doubt upon this case; the point is perfectly clear. The proceeding is under the third section of the statute 49 *Geo.* 3, c. 125. The early part of that section provides, that if complaint shall be made of relief being refused, two justices, *residing within the county in which the society is held*, shall summon the party complained against; and the latter part directs all the subsequent proceedings to be taken before *such justices*. The word *such* can only mean *resident*; if the first proceeding is to be before two resident justices, the order must be made by them also.

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The direction of the learned judge, therefore, was perfectly correct, and no rule can be granted.

The other Judges concurred.

### Rule refused (a)

(a) A friendly society, whose rules have been allowed by the magistrates and registered in London, afterwards hold their meetings in Middlesex. The magistrates of Middlesex have jurisdiction to decide upon com-

plaints made by members of the society. So held upon an indictment for disobedience to an order of two justices of Middlesex. *Rex v. Gush*, 1 Stark. N. P. C. 441; Mann. N. P. Digest, 2d ed. 209.

### DAVIES and others v. The KING (in error).

An indictment charging that *A.* and others, on, &c. at, &c. to the number of three together, did by night unlawfully enter divers closes, and were then and there in the said closes, armed with guns, for the purpose of destroying game, does not sufficiently allege that the defendants were by night in the closes, armed, for the purpose of destroying game.

**THIS** was an indictment for poaching. The first three counts were founded on the statute 57 *Geo.* 3, c. 90, which proved to have been repealed before the alleged offence was committed; they were, therefore, abandoned. The fourth count, the only one now relied on, stated, "that *Davies* and others, (naming them,) with force and arms, on the 17th day of December, in the year aforesaid, at the parish of Whitegate, in the county of Chester, being to the number of three or more persons together, did, by night, unlawfully enter divers closes and inclosed lands there situate, and being in the occupation of the said *E. C.*, and were then and there in the said closes and lands, armed with guns and other offensive weapons, for the purpose of then and there taking and destroying game, against the form of the statute." At the trial before *Jervis*, J., at the last Spring Assizes for Chester, the defendants were convicted upon this count, and sentenced to fourteen years' transportation. A writ of

error was afterwards brought, which now came on for argument.

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*J. Jervis*, for the plaintiffs in error. The fourth count is bad in various particulars. The offence charged being one created by statute, all the particular circumstances given to define the offence should be distinctly stated, and the case should be brought within the statute by express words: 2 *Hale*, P. C. 170; *Staundf.* 132 b.; *Foster*, C. L. 423. The 9 *Geo.* 4, c. 69, s. 9, describes the offence as being, any persons to the number of three or more together by night unlawfully entering or being on any land, open or inclosed, for the purpose of taking or destroying game, any of such persons being armed; and s. 12 declares, that for the purposes of that act the night shall be considered to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise. Therefore, first, it should have been stated at what hour between sunset and sunrise the defendants were in the closes, in order to shew clearly that they were there *by night*, within the meaning of the act of parliament. That was the ancient rule with respect to indictments for burglary, although it may have been somewhat deviated from in modern practice. In 2 *Hale*, 179, it is said, "Where the time of the day is material to ascertain the nature of the offence, it must be expressed in the indictment; as, in an indictment for burglary, it ought to say, 'tali die, circa horam decimam in nocte ejusdem diei, felonice et burglariter fregit;' but, according to some opinions, 'burglariter' carries a sufficient expression that it was done in the night." And in *Waddington's case* (a) it was held, that in an indictment for burglary, either at common law or upon 12 *Ann.* st. 1, c. 7, (repealed, but

(a) 2 East, P. C. 513.

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re-enacted by 7 & 8 *Geo.* 4, c. 29), it was necessary to lay the crime to have been committed in the night, and at about such and such an hour, though the evidence need not strictly correspond with the latter allegation; but that an indictment making no mention of the hour would be insufficient for burglary, though it would hold for the larceny. Secondly, there is no allegation that the defendants were unlawfully in the closes for the purpose of destroying game, it is only stated that they unlawfully entered the closes. The intent is not coupled with their unlawfully being there. The entry might be unlawful from the means by which it was effected, and yet the defendants, when there, might be in the pursuit of some lawful occupation. Thirdly, it is not alleged that the defendants were in the closes together to the number of three: it is merely stated that they entered the closes together to the number of three. In this the main object of the statute, namely, to prevent preconcerted resistance to apprehension, is lost sight of. Here no unity of purpose is alleged; the statement is consistent with the supposition that the defendants entered together, and separated before the intent charged was contemplated by either of them. Fourthly, there is no description of the closes; the defendants are merely charged with having entered "divers closes and inclosed lands." That is not a sufficient averment; the indictment ought in some way or other to particularise the place, because the defendant is entitled to know to what specific place the evidence is to be directed: *Ridley's case* (a). Lastly, the allegation, that the defendants were armed, is misplaced. The offence described in the statute is, the being in the close with intent to destroy game, being armed; the offence described in the indictment is, the being in the close, armed, with intent to destroy game:

(a) R. & R. C. C. 515.



in this respect the indictment follows neither the letter nor the spirit of the statute, and is bad accordingly.

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*Cottingham*, *contra*. The fourth count is good. [Lord *Tenterden*, C. J. Can you support this count in respect of the allegation that the offence was committed by night? Does the averment that the defendants were *then and there* in the said closes necessarily imply that they were there *by night*? Does it imply any more than that they were there *on the day and place aforesaid*? If it mean the latter only, the count is clearly bad.] The averment that the defendants were then and there in the closes, follows immediately the averment that they entered the closes by night. The entry by night is the last antecedent, and to that the words "then and there" must be taken to refer, and so taken, there is, in effect, an allegation that the defendants were in the closes *by night*. The description of the offence in this count is sufficient according to the rule laid down by *De Grey*, C. J., in *Rex v. Horne* (a), and Lord *Kenyon*, C. J., in *Rex v. Hollond* (b). The former says, "The charge must contain such a description of the crime, that the defendant may know what crime it is which he is called upon to answer, that the jury may appear to be warranted in their conclusion of guilty or not guilty upon the premises delivered to them, and that the Court may see such a definite crime that they may apply the punishment which the law prescribes:" and the latter, "It is argued that three things ought to concur in every criminal proceeding; first, that the party accused may be apprised of the charge he is to defend; secondly, that the Court may know what judgment is to be pronounced according to law; and thirdly, that posterity may know what law is to be derived from the record.

(a) *Cowper*, 682.

(b) 5 T. R. 607.

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These are general propositions to which I assent." The count now in question should be read as one sentence, and then it clearly charges that the defendants committed an offence by entering and being by night in certain closes, armed, with intent to destroy game; and that is the offence described by the statute.

LORD TENTERDEN, C. J.—It seems to me that the objection to which I directed Mr. *Cottingham's* attention cannot be got over. The count states that the defendants "did by night unlawfully enter divers closes, and were then and there in the said closes," &c. It does not state that they "by night did unlawfully enter, and were," &c. If it had done so—if the words "by night" had been placed at the beginning of the sentence—they might have governed the whole sentence. Or, if they had been placed at the end of the sentence, they might have referred to the whole sentence. But here they are placed in the middle of the sentence; are applied to a particular branch of it; and cannot, therefore, be extended to that which follows. The sentence contains two distinct branches. The first states that the defendants by night entered into the closes, but does not state that they entered being armed, or for the purpose of destroying game. The second states that they were in the closes, armed, for the purpose of destroying game, but does not state that they were there by night. These two branches of the sentence being distinct, therefore, and neither of them stating all that is necessary to constitute the offence described in the statute, the count is bad. Upon this ground, without entering into the other objections that have been raised, I am of opinion that the indictment in this case cannot be supported, and that the judgment must be reversed.

The other Judges concurred.

Judgment reversed.

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## The KING v. The Inhabitants of MARTLESHAM.

ON appeal against an order of justices for the removal of *Henry Athrol*, otherwise *Walford*, from the parish of Playford to the parish of Martlesham, both in the county of Suffolk, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

*Sarah Athrol*, single woman, being pregnant, was removed by an order of justices from Playford to Stutton. Before the sessions, she was delivered at Stutton of the pauper, a bastard. At the sessions, Stutton appealed, and the justices quashed the order. It was admitted on the present appeal, that the mother, at the time of the bastard's birth, belonged to the parish of Martlesham.

A single woman, settled in *A.*, was removed from *B.* to *C.* The order of removal was quashed on appeal, but she had been previously delivered of a bastard child in *C.*:—Held, that the child was not settled in *A.*

*Scarlett*, A. G. and *T. Clarkson*, in support of the order of sessions. Under the peculiar circumstances of this case, the pauper, though born illegitimate in the parish of Stutton, was not settled there, but in the parish of Martlesham, the place of his mother's settlement. It is a general rule, no doubt, that a bastard, being *nulius filius*, cannot take a settlement by parentage, and is settled where born; but the present case seems to form an exception to it. It is the very case put by *Bayley*, J. in *Rex v. St. Nicholas, Leicester* (*a*), where he said, "If the mother of a bastard child is laid under constraint, and removed to a place against her will, and is there delivered, the law says that the child shall not be considered as settled in that place; because the mother was not there in the character of a free agent. The legislature presumes in such a case, that if she had been left to herself she would have remained in the parish in which she was settled, and, consequently, that the burthen ought to fall in the place in which it would have

(a) 4 D. & R. 462; 2 B. & C. 889; 2 D. & R. Mag. Cas. 253.

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fallen in the ordinary course of events but for her removal (a)." Here the mother was under constraint. She was settled at Martlesham, but was wrongfully removed to Stutton; therefore, she must be considered as having been resident at Martlesham at the time when the child was born. In any view of the case it is more reasonable to consider her, in construction of law, as residing in Martlesham, her own parish, than in Playford. At common law, if an illegitimate child is born while the mother is in the custody of the law, as where she is in the house of correction, *Suckley v. Whitborn* (b), or in the county gaol, *Elsing v. The County of Hereford* (c), it follows the settlement of the mother. Here, if the mother had been convicted of an offence in Playford, and committed to a gaol in Stutton, the child would have been settled in Martlesham, the place of the mother's settlement, because her residence in Stutton, being constrained, would have been deemed in law a residence in Martlesham: and the mother's removal to Stutton had the same effect, for it was made by an order of magistrates over whom the parish of Playford had no control, and who sent the mother to that place in which she then appeared to them to be legally settled. The cases of *Much Waltham v. Peram* (d) and *Westbury v. Coston* (e) do not affect the present question, because they only decide that if a woman be delivered of an illegitimate child pending an order of removal which is afterwards quashed, the child is not settled in the parish in which it was born; they do not decide that the child is settled in the parish from which the mother was removed, if that parish is not the place of her settlement. In the first of those cases the mother's settlement was in Much

(a) 4 D. & R. 467; 2 D & R.  
 Mag. Cas. 258.

(b) 2 Bott, 2; 2 Bulstr. 358.

(c) 2 Bott, 4.

(d) 2 Salk. 474.

(e) 2 Salk. 532.

Waltham; in the other, it does not appear from the report whether the mother's settlement was in Westbury or not.

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*W. E. Taunton*, contrà. If the parish officers of Playford had used due diligence they might have discovered that the mother's settlement was in Martlesham, and have removed her thither before the birth of the child; instead of which they wrongfully removed her to Stutton, where she continued until the child was born and the appeal determined. The mother's residence in Stutton therefore, being the consequence of a wrongful removal, must, by construction of law, be considered as a residence in Playford, and the child must be considered as having been born in Playford, and, consequently, as settled there. At all events the removal of the pauper to Martlesham is illegal, for he is clearly not settled there, because being illegitimate he cannot derive any settlement from his mother.

LORD TENTERDEN, C. J.—It is sufficient for present purposes to say that the removal to Martlesham cannot be supported. A bastard cannot acquire a settlement by parentage, therefore the pauper was not legally settled in Martlesham. The order of sessions must be quashed.

The other Judges concurred.

Order of Sessions quashed.



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DAVIS v. CAPPER, Esq.(a)

A warrant of commitment for re-examination for an unreasonable time, as for fourteen days, is wholly void; and *trespass* lies against the committing magistrate, though he acted without any indirect or improper motive.

**TRESPASS** against the defendant, a magistrate of the county of Gloucester, for assaulting and imprisoning the plaintiff, and detaining her in prison fifteen days. Plea, not guilty; and issue thereon. At the trial before *Gaselee, J.* at the Gloucestershire Summer Assizes, 1828, the case was this:—*Mary Davis*, the plaintiff, had lodged in the house of one *Ann Hamerton*, at Cheltenham; and on the 5th of January, 1828, she made a deposition that she had been robbed of various articles of property, and that some of them had been discovered in the possession of *Ann Hamerton*. The parties appeared before a magistrate, but the charge against *Ann Hamerton* was at that time dismissed. On the 27th of January *Ann Hamerton* sent for one *Russell*, the superintendent of police at Cheltenham, and informed him that she had been robbed while *Mary Davis* lodged with her. She produced a letter addressed to the plaintiff at her, *Ann Hamerton's*, house, and bearing the London post-mark, stating that she had reason to believe the contents would lead to a discovery of the thief, whom she strongly suspected to be the plaintiff. *Russell* opened the letter, which was signed "*Obadiah*," and purported to be written by an accomplice in the robbery residing in London, who demanded payment of the plaintiff as the perpetrator of the robbery, and stated that he would wait a fortnight for her answer. *Ann Hamerton* also informed *Russell* that four days after the robbery a letter in the same handwriting, and with the London post-mark, had been delivered to the plaintiff, who refused to shew it; and she concluded by requesting *Russell* to take the plaintiff into custody. *Russell* did accordingly

(a) See *Davis v. Russell*, 2 Moore & P. 590; *ante*, 226.

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apprehend the plaintiff late the same evening, detained her in prison that night, and on the following morning carried her before the defendant. The letter was there produced and read, and *Ann Hamerton* deposed that during the time the plaintiff lodged with her she had lost various articles of bed furniture and wearing apparel, and that she had reason to suspect, and did suspect, that the plaintiff was concerned in the robbery. Upon this information the defendant committed the plaintiff to the Bridewell at Northleach, under a warrant requiring the gaoler to keep her in custody until the 12th of February, and on that day to bring her up for further examination. On the 12th of February the plaintiff was brought up before two other magistrates for further examination, and was by them re-committed. On the 16th she was again brought up before the defendant, who then discharged her, stating that there was no evidence against her, that he would have discharged her on the 12th if he had been present at the examination, and that he had committed her in the first instance until the 12th under the expectation that she would by that time have explained the history and circumstances of the letter. No evidence was produced on the part of the defendant, but it was contended that the action could not be maintained on two grounds: first, that the defendant had done nothing illegal, every magistrate having a discretionary power to commit for further examination for such period as he thinks proper; and, secondly, that even if he had abused his discretionary power, and thereby acted illegally, case, and not trespass, was the proper form of action. The learned judge inclined to think that the action was not maintainable, but to save the expense of another trial he left two questions to the jury: first, whether the commitment was made *bonâ fide* for the purpose of further examination, or for the

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purpose of compelling the plaintiff to state who was the writer of the letter; and, secondly, whether they considered the time for which the plaintiff had been committed was a reasonable time. The jury retired, and, after an absence of several hours, returned stating that they could not agree; whereupon the learned judge discharged them from giving any verdict and nonsuited the plaintiff. In Michaelmas term, 1828, a rule nisi for a new trial was granted, upon the grounds, first, that there was evidence to go to the jury that the commitment was made for the purpose of extorting a confession, and not for the purpose of further examination, and therefore was illegal; and, secondly, that even if the commitment was made *bonâ fide* for the purpose of further examination, it was made for an unreasonable time, and therefore was illegal. In Hilary term, 1829,

*Taunton* shewed cause against the rule. This nonsuit was right, for the form of action was wrong. Assuming that there was evidence from which it might be implied that the defendant acted maliciously in committing the plaintiff, the form of action should have been case, and not trespass. If the defendant had jurisdiction over the subject-matter of the complaint, and the warrant is good upon the face of it, trespass is not maintainable; because the foundation of that action is, that the defendant had no jurisdiction, but was a mere wrong-doer. The defendant here clearly had jurisdiction, for a complaint was made upon oath before him, and a felony charged. [*Bayley, J.* The complainant only swore that she had reason to suspect, and did suspect, that the plaintiff was concerned in the felony. Such a deposition would justify the apprehension of the party, but I doubt whether it justified her committal. Besides, is fourteen days a reasonable time for which to commit for further exami-



nation?'] It may or may not be so, according to the circumstances. Generally speaking, the time for which a prisoner shall be committed for further examination is a matter in the discretion of the magistrate, and that discretion, exercised *bonâ fide*, is conclusive. But even if that be not so, still, if under any circumstances the warrant can be good, it is an answer to the action. A fortnight may be too long, but it is not necessarily so. Here the letter produced before the defendant spoke of a fortnight; he may have considered that letter as genuine, and believed that the writer would wait a fortnight; and upon that ground may have committed the plaintiff for that time for further examination. *Scavage v. Tateham* (a) may be relied on for the plaintiff, but that was a very different case from the present. There the magistrate detained the prisoner in custody in his own house; the detention was for the space of *nineteen* days; and it did not appear that there had been any examination at all.

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*Curwood*, *contra*, was stopped by the Court.

BAYLEY, J.—I am of opinion that the rule for a new trial ought to be made absolute. Upon one question I entertain no doubt; it is clear that a magistrate may legally commit for further examination. But I think it equally clear that it should have been left to the jury to say whether the commitment was made *bonâ fide* for the purpose of further examination, or for the purpose of inducing the plaintiff to make a confession. The declaration of the defendant, that he had committed the plaintiff in the first instance until the 12th, under the expectation that she would by that time state who was the writer of the letter, was certainly evidence to go to the

(a) Cro. Eliz. 829.

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jury that he did not commit for the purpose of further examination. Upon the other ground, the authorities are very strong to shew that a magistrate ought not arbitrarily to commit, even for the purpose of further examination, for so long a period as the defendant in this case did. The duty of magistrates in this respect is pointed out in *Hale's Pleas of the Crown* (a), and is this :—Where a party arrested for felony is taken before a magistrate, he must discharge, or commit, or bail him. But prior to so doing he must, by 1 and 2 *Ph. & M. c. 13*, and 2 and 3 *Ph. & M. c. 10(b)*, (re-enacted by 7 *Geo. 4, c. 64*.) take the informations upon oath of the prosecutor and witnesses, and put them into writing. He must also take the examination of the prisoner, not upon oath, and put that into writing. And because it may be unreasonable to take these informations or examinations presently, or possibly it may take longer time, the prisoner may be continued in the custody of the officer, or may be detained in the magistrate's house, or committed to some near safe place of custody, till the examination can be taken: but this must be dispatched in some convenient time. The case of *Scavage v. Tateham* (c) is there referred to. That was an action for false imprisonment in London from the 10th to the 29th of September. The defendant justified, that he was mayor and justice of the peace in Pomfret, and that robbery was done there, and the plaintiff was thereof suspected and brought before him, and therefore he detained him in his house during that time to examine him and one *Pole*, who was not apprehended, concerning the robbery; and afterwards, on the 29th of September, delivered him over to the new mayor; and traversed the imprisonment in London. And upon demurrer it was

(a) Vol. I. p. 586; II. p. 120.

(c) Cro. Eliz. 829.

(b) *Ante*, 319 (a).

adjudged that the inducement to the traverse was not good; for a justice of peace cannot detain a person suspected in prison, but during a convenient time only to examine him, which the law intends to be *three* days, and within that time to take his examination and send him to prison, for he ought not to detain him as long as he pleaseth, as he did, eighteen days. That decision, if adopted as an authority to its full extent, would shew that the law has limited the reasonable time to *three* days. But I am not disposed to go to that length. I do not think it possible to fix any specific limit. The time for which a party may reasonably be committed for further examination must depend upon the nature and circumstances of the case. But then those circumstances ought to be detailed in evidence. They should have been detailed in evidence in this case. Then, if the question had proved a mere question of law, the judge should have determined it; if a mixed question of law and fact, the judge and the jury should have determined it. In *Burn's Justice*, vol. i. p. 1009, 24th ed. n. there is this case (a):—*Gooding* was convicted at the London Sessions, in May, 1820, of assisting *Davis* to escape from the Giltspur Street counter, where he had been in custody, charged with forgery. The case was afterwards submitted by his majesty to the judges, in consequence of a petition presented by *Gooding*, alleging that *Davis* was never in *legal* custody, and submitting that *Gooding*, therefore, could not legally be convicted of assisting him to escape. The fact was, that *Davis*, at the time of his escape, was under commitment for further examination only, and that no warrant, commitment, or any written authority was ever made out by

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(a) Cited by *Park, J.* in his charge to the grand jury, Monmouth Summer Assizes, 1823, *Chitty's Burn's Justice*, vol. ii. p. 100, n.

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the committing magistrate, or by any other magistrate. The only question submitted to the judges was, whether a commitment for further examination, not being in writing, was legal. The judges were unanimously of opinion that such a commitment, if made for a reasonable time, was legal, though not in writing; but they stated that they considered the question, what was a reasonable time, to be a mixed question of law and fact; and that as the facts of the case were not fully detailed, they could form no opinion, in point of fact, whether the time in the particular case was a reasonable time or not; but that they presumed it must have been proved at the trial to be so, because otherwise the prisoner ought to have been acquitted. That statement of the judges shews them to have been of opinion, that the question whether the time, for which the party was committed for further examination, was reasonable or not, depended upon the circumstances of the case, and that the judgment of the committing magistrate was not conclusive of that question. I feel myself bound to act up to that opinion in the present case, and to state, that the circumstances which induced this defendant to commit the plaintiff for fourteen days not being detailed, I find myself unable to say whether that time was a reasonable time of commitment for further examination or not. Upon this view of the case, upon both grounds, I am of opinion that justice cannot be done without a new trial being had.

LITLEDALE, J.—I also think that there ought to be a new trial in this case, for the purpose of trying the question, whether the plaintiff was committed by the defendant really and *bonâ fide* for the purpose of further examination, or for the purpose of forcing from her a confession regarding the person who wrote the in-

tercepted letter. If the commitment was made for the latter purpose it is quite clear that it was illegal. Upon the question of the discretionary power of magistrates, as to the time for which they can legally commit for further examination, I should require opportunity for consideration before I came to any decision; but it is not necessary to decide that question in the present case.

PARKE, J.—I am also of opinion that there must be a new trial had in this case, for the reason given by my brother *Littledale*. Upon the other point I agree with my brother *Bayley*, that it is a mixed question of law and fact for the consideration of the jury, after a detail of all the circumstances, whether the time of commitment for further examination is reasonable or not. The case of *Scavage v. Tateham*, in whatever view regarded, seems to me to establish that proposition; because, though the decision there may have proceeded on the ground that the prisoner had been improperly detained in the magistrate's house instead of being committed to prison, or that he had been improperly delivered over to the new mayor without any examination having taken place, still it appears from the report rather to have proceeded upon the ground that a magistrate has no authority to detain a suspected person in custody beyond a reasonable time for the purpose of his examination: and it is clear that Lord *Hale* takes that view of the decision in the part of his treatise referred to by my brother *Bayley*. So, in *Gooding's* case, it is clear that the judges thought the time for which the magistrate had detained the party in custody was not to be considered conclusively as reasonable; but that the reasonableness of the time was a mixed question of law and fact, to be determined by the judge and jury. A new trial, therefore, must be had; which, if there be any

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doubt upon this point, will give the defendant the opportunity of raising the question upon the record.

Rule absolute for a new trial.

At the Gloucestershire Summer Assizes, 1829, the cause was tried again before *Vaughan B.*, upon the same evidence as before. That learned judge left two questions to the jury: first, whether the defendant in committing the plaintiff for the time mentioned in the warrant acted *bonâ fide*, or was influenced by some indirect or improper motive; and secondly, if they thought that the commitment was made *bonâ fide* for the purpose of further examination, whether the time was reasonable: and his lordship expressed his own opinion that the time was, under the circumstances, unreasonable. The jury found that the commitment was made *bonâ fide* for the purpose of further examination only, but that it was made for an unreasonable time, and returned a verdict for the plaintiff with 10*l.* damages. The learned judge gave the defendant leave to move to enter a nonsuit, if the Court should be of opinion that trespass was not maintainable for an unreasonable commitment made without any indirect or improper motive. On a former day in this term

*Taunton* moved accordingly. Had the defendant acted wholly without jurisdiction, and shewn his want of jurisdiction upon the face of his warrant of commitment, trespass would have been maintainable; but he had jurisdiction to commit, and his warrant was good upon the face of it; therefore trespass will not lie. This distinction is taken in the late case of *Groome v. Forrester (a)*. Lord *Hale*, speaking of commitment in cases

(a) 5 M. & S. 314.

of felony, says (a), "The want of certainty seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment, but it lies in averment to excuse the gaoler or officer, that the matter was for felony." Here, the defendant having jurisdiction to commit for a reasonable time, and the reasonableness of the time being a mixed question of law and fact, (the law having assigned no fixed limit,) it is impossible to say when precisely the time became unreasonable, and the want of jurisdiction arose. The defendant, therefore, at most, has fallen into an irregularity in the exercise of his jurisdiction; and though that may render him liable to an action on the case, still, having had jurisdiction, he cannot be treated as a trespasser (b). It may be doubted whether the plaintiff would have been entitled to her discharge by habeas corpus; and trespass does not lie unless the commitment be so utterly void as to entitle the party committed to be discharged by habeas corpus, although the converse of the proposition does not hold; for a party may be entitled to discharge by habeas corpus, and not entitled to maintain trespass for false imprisonment. [*Bayley, J.* May not a warrant of commitment be good for part of the time, and bad for the residue?] Not so as to make the magistrate a trespasser. It is impossible to draw the line. Besides, here no part was bad. It was a mere irregularity. [*Parke, J.* *Gooding's case* (c), shews that a commitment for an unreasonable time is void altogether. *Lord Tenterden, C. J.* Suppose a magistrate had authority by statute to commit for one month, and he committed for two, would not trespass lie against him?] Undoubtedly it would, because the law having limited his jurisdiction

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(a) Hale's P. C. 583.

&amp; R. M. C. 563.

(b) Vide *Basten v. Carew*, 5 D.

(c) 1 Burn's J. 1009, 24th ed.;

&amp; R. 558; 3 B. &amp; C. 619; 2 D.

2 Chitty's Burn's J. 100, n.

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to a month, the commitment would be void for the second month, in respect of which he would be wholly without jurisdiction. Here the magistrate had jurisdiction to commit for a reasonable time, without any express limitation; and there is nothing upon the face of the warrant to shew that the time for which he committed was unreasonable.

*Cur. adv. vult.*

Lord TENTERDEN, C.J. now delivered judgment.— This was an action of trespass brought against the defendant, a magistrate, who had committed the plaintiff for a period of fourteen days for the purpose of further examination. The jury found that the commitment was made *bonâ fide* for that purpose, and without any indirect or improper motive, but that the time for which it was made was unreasonable. It was contended on the part of the defendant that the form of the action was improper, that it should have been case and not trespass. We are, however, of opinion that trespass was the proper form of action. A special action on the case cannot be maintained against a magistrate for anything done by him in that capacity, unless his conduct has been influenced by some improper motive, and here the jury expressly negated such a motive. And whether we consider this commitment as absolutely void from the beginning, as being for an unreasonable time, or consider it as void only *pro tanto*, that is, for so much of the time as was unreasonable, still an action of trespass would be maintainable; because the legal character of the act is the same, and every continuance of the party in custody is a new imprisonment and a new trespass. It appears to us, however, to be the far better opinion that, in a case like this, where the time is unreasonable, the



commitment is void from the beginning (a). The duty of a magistrate is to commit for a reasonable time, and if he commit for an unreasonable time, he thereby does an act which he is not authorised by law to do. It is clear that in *Gooding's* case (b) the judges thought that a commitment for an unreasonable time would be a void commitment; for the report states, that they presumed that it must have been proved at the trial that the time was reasonable, because otherwise the prisoner ought to have been acquitted. That goes to the very point, that a commitment for further examination, if it be for an unreasonable time, is, therefore, wholly void, because the judges were of opinion that the party so committed was not in legal custody, and, therefore, that another person who had aided him to escape from prison was not guilty of any offence against the law. For this reason, as well as for the other which I have already stated, we are of opinion that trespass was the proper form of action in this case.

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#### Rule refused (c).

- (a) And see *Rex v. Ellis*, 8 D. 2 Chitty's Burn's J. 100, n. & R. 173; 4 D. & R. M. C. 29. (c) And see *Hardy v. Ryle*, (b) 1 Burn's J. 1009, 24th ed.; ante, 301; 9 B. & C. 603.

#### The KING v. The Inhabitants of ST. PAUL, EXETER.

TWO justices, by their order, removed *Jane Bishop*, single woman, from the parish of St. Paul, in the city and county of Exeter, to the parish of Tedburn St. Mary, valid if allowed by two justices under their *hands only*, though expense be incurred, but not clandestinely, by the parish funds, under 56 Geo. 3, c. 139, ss. 1 to 10. S. 11 of that act, which requires an allowance by two justices under their hands and seals, applies only to cases where expense is incurred by the parish funds, the parish officers not being parties to the indenture.

An indenture of apprenticeship to which parish officers are parties, is

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in the county of Deyon; and the sessions, on appeal, quashed the order, subject to the opinion of this Court upon the following case:—

The pauper, *Jane Bishop*, was, in the year 1818, bound an apprentice *by the parish officers of Tedburn St. Mary* to one *H. Belworthy*. The indenture by which she was bound was made in pursuance of a previous order of two justices, to which reference was made by its date, and was duly executed by the said parish officers and by the master. An allowance of the same was written at the foot thereof, which was signed by two justices, *but was not under seal*. On occasion of this binding an expense of 17s. was incurred by the public parochial funds of the parish of St. Mary, namely, 7s. as the costs of preparing the indenture, and 10s. which were given to the master with the pauper. The pauper resided in the parish of St. Mary under this indenture for about four years.

*Crowder*, in support of the order of sessions. The indenture of apprenticeship in this case was one by reason of which expense was incurred by the public parochial funds, and which ought to have been approved of by two justices under their hands *and seals*, within the express words of the statute 56 *Geo. 3*, c. 139, s. 11. Its approval by two justices was not under their seals, for which defect the sessions quashed the order of removal, as they were bound to do. The section referred to recites, that the salutary provisions enacted by the 43d of *Elizabeth* were frequently evaded in the binding out of poor children, and the premium of apprenticeship, or a part thereof, was clandestinely provided by parish officers, who were thus enabled to bind out such poor children, without the sanction of justices; and enacts, “ that no indenture of apprenticeship, by reason

of which any expense whatever shall at any time be incurred by the public parochial funds, shall be valid and effectual, unless approved of by two justices, under their hands and seals, according to the provisions of the said act (43 *Elizabeth*) and of this act." The words of the enactment are undoubtedly more extensive in their import than those of the recital, and they were considered to be so, and full operation was given to them, by *Bayley, J.* in *Rex v. Mattishall (a)*. It is true that the first ten sections of this statute apply to parish indentures, and require *only* that the allowance of those indentures shall be *signed* by two justices. But that cannot restrain the operation of additional words in the eleventh section, and that in express terms requires that every indenture by reason of which expense is incurred by the public parochial funds, shall be allowed by two justices under their hands *and seals*. The object of the eleventh section was to place all parish bindings under the superintendence and direction of two justices. There is nothing contradictory between that and any of the preceding clauses; the one is cumulative upon, not inconsistent with the others. But independently of this, the words of the eleventh section are plain, express and positive, and cannot be restricted in their fair operation, *Rex v. Stoke Damarel (b)*; where it was held that an indenture, in respect of which expense was incurred by the parish, must be allowed by two justices under their hands *and seals*, though the parish officers were not parties to it: and where *Bayley, J.*, speaking of this section, said, "I do not know how to get over the words of this clause of the act of parliament; they are plain and unequivocal: and I shrink from adopting a rule of construction with respect to them, which would have the

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(a) *Ante*, 29; 8 B. & C. 735. (b) *Ante*, i. 155; 7 B. & C. 563.

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effect of deciding that the legislature did not mean that which they have expressed" (a). [*Parke, J.* In that case the binding was one clearly within the recital of the eleventh section; *Rex v. Mattishall* (b) only shews that the enactment extends to cases ejusdem generis with those mentioned in the recital: in the latter case the parish officers did not provide part of the premium, but furnished money to purchase clothes for the apprentice.] Cases may come within the enactment which are not mentioned in the recital: the argument on the other side must be that the enactment is controlled and limited by the recital.

*Coleridge, contra.* The cases which have been cited do not apply to the present, because there the parish officers were not parties to the indenture, here they are. This is a parish indenture, and the question is, whether such an indenture must be allowed under *seal* by 56 *Geo. 3, c. 139, s. 11*; a question certainly not decided in either of the cases referred to. The mischief intended to be remedied by that statute was the improper apprenticing of poor children, and the remedy suggested is the securing in all cases the control of two justices. The mischief extended to two classes of apprentices, first, parish apprentices, or children entirely and exclusively bound out by parish officers; and, secondly, apprentices *really* bound out, wholly or in part, by parish officers, but *nominally* by their parents or themselves, so as to evade the provisions of the statute of *Elizabeth*. To the first of these classes the first ten sections of the present statute apply; to the second, the eleventh section. The first and second sections direct in what manner parish apprentices shall be bound, and one of the directions is that the allowance of the indenture shall be signed by

(a) *Ante*, i. 163.

(b) *Ante*, 29; 8 B. & C. 735.

two justices. The fifth section provides that no settlement shall be gained, unless the allowance of the indenture shall be signed as before directed. The sixth section imposes a penalty on the parish officers and the master, whenever a parish apprentice is bound without the allowance before directed. Looking at these two sections together, it is obvious that the same default is made the ground of avoiding the settlement on the one hand, and imposing the penalty on the other, namely, the binding the apprentice without an allowance *signed* by two justices. But looking at the fifth section alone the inference clearly is, that where the directions there referred to are complied with, a settlement will be gained, that is, where the allowance is signed, and signed only, by two justices. [*Bayley, J.* In this case expense has been incurred by the parish; does not that bring it within the operation of the eleventh section?] It is submitted that it does not, because this is strictly a parish binding, to which that section does not apply. In *Rex v. Bawburgh (a)*, which was the case of a parish binding, and where the indenture was held to be invalid under the first and fifth sections of the statute, *Bayley, J.* is reported to have said, "I doubt whether the eleventh section applies to such a case as the present, or whether it applies only to such cases where the binding is by the parents, and not by the overseers" (*b*). Indeed that section seems to have been introduced for the very purpose of meeting those cases in which the parish officers are not the parties binding; and here they are the parties binding. [*Littledale, J.* Still there has been expense incurred by the parochial funds.] But not *clandestinely*. The recital of the eleventh section speaks of "premiums clandestinely provided by parish officers." The enactment speaks of "expense incurred by the public parochial

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(a) 3 D. & R. 338; 2 B. & C. 222; (b) 2 B. & C. 225.  
 2 D. & R. M. C. 23.

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funds." Construing both together, and at least the recital is to be considered as the key for the proper construction of the enactment, the latter must be taken to mean "expense *clandestinely* incurred." Now the sessions have not found that the money was advanced clandestinely in this case, and the Court will not presume fraud.

The case was argued at the sittings in Banc after the last term, when the Court took time for consideration. Judgment was now delivered by

BAYLEY, J., who, after recapitulating the facts of the case, proceeded to the following effect:—It was insisted that the fact of expense having been incurred by the public parochial funds brought the case within the operation of the eleventh section of the statute, the 56 Geo. 3, c. 139. Undoubtedly, if that section extends to cases where the binding appears, upon the face of the indenture, to be by the parish officers, the indenture now in question would be void for want of the seals of the justices. If, on the other hand, it applies only to cases where the parish officers are not parties to the indenture, but where some part of the expense attendant upon the binding is paid out of the public parochial funds, the converse would be the result. After a careful consideration of the statute, and conferring with my Lord *Tenterden*, who concurs in the judgment I am about to pronounce, we are of opinion that the first ten sections are confined to cases where the parish officers are parties to the indenture of apprenticeship, and that the eleventh section is confined to cases where the parish officers are not parties to the indenture, but where expense is incurred by the public parochial funds. That this is the true meaning of the eleventh section appears to us to be evident from the use of the word "*clandestinely*" in the preamble of that section. The mischief recited in

that preamble is, that the premium of apprenticeship, or a part thereof, was *clandestinely* provided by parish officers, who were thus enabled to bind out poor children without the sanction of justices; and, for remedying that mischief, the enacting part of the clause provides, that no indenture, by reason of which any expense shall be incurred by the public parochial funds, shall be valid, unless approved of by two justices under their *hands and seals*. The first ten sections, which evidently apply only to bindings by parish officers, require that the indenture shall be approved of by two justices, under their *hands only*. Parish officers cannot be said to provide the premium clandestinely where they are parties to the indenture; therefore, the eleventh section can apply only to cases where they are not parties to the indenture, but where they do provide the premium, or some portion of it. In this case the parish officers were parties to the indenture, which, therefore, is one regulated by the first ten sections of the statute; and the allowance of it being signed, though not sealed, by two justices, it is a valid indenture, and the pauper gained a settlement by service under it in the parish of Saint Mary. The order of sessions must consequently be quashed.

Order of Sessions quashed.

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## The KING v. The OXFORD CANAL COMPANY.

By the Oxford Canal act the proprietors were authorised to take a mileage tonnage for coals and other goods, excepting coals for two miles, in respect of which the proprietors of the Coventry Canal were authorised to take all dues payable under that act for all coals carried from the Oxford Canal within those two miles. By the same act the proprietors of the Oxford Canal were authorised to take all dues payable under the

BY a rate made for the relief of the poor of the parish of Foleshill, in the county of the city of Coventry, the Oxford Canal Company were rated for their messuages, buildings, stop-land, towing-path, and that part of the canal lying within the said parish, and for the tolls, duties, and tonnages arising therefrom, estimated as of the annual value of 2000*l.*, at 100*l.* On appeal, the sessions confirmed the rate, subject to the opinion of this Court upon the following case:—

By 9 *Geo.* 3, c. 70, the appellants were empowered to make and maintain a navigable canal from the Coventry Canal Navigation to the city of Oxford. The appellants are the owners and occupiers of the canal which has been made by virtue of this act. The length of the canal is as follows:—

From the northern extremity at Longford, where it joins the Coventry Canal, to Braunston, the point of union with the Grand Junction Canal, is thirty-four miles seven eighths.

From Braunston to Napton, the point of union with the Warwick and Napton Canal, is seven miles.

Coventry Canal act, for all goods, except coals, carried upon the Oxford Canal, and afterwards upon the Coventry Canal, within three miles and a half of the point of junction of the two canals. That point of junction was in parish F., which contained one mile nine hundred and sixty-three yards of the Oxford Canal, part of the two miles before mentioned, and two miles and a quarter of the Coventry Canal, part of the three miles and a half before mentioned.

By the Grand Junction Canal act, reciting that that canal might be injurious to the proprietors of the Oxford Canal, and that compensation should be made to them for such injury, they were authorised to take 2*s.* 9*d.* per ton for all coals passing from the Oxford Canal into the Grand Junction Canal, without regard to the distance they might pass on the Oxford Canal; and 4*s.* 4*d.* per ton for all other goods passing from any canal into the Oxford Canal, and from thence into the Grand Junction Canal, or vice versa, without regard to the distance they might pass on the Oxford Canal:—

Held, that the proprietors of the Oxford Canal were ratable in parish F. for *all* the dues received by them, in the proportion in which they were severally earned in that parish, but that, in fixing the rate, *all* the expenses incurred in maintaining the part of the canal situate in that parish must be first deducted from the total amount of dues received.



From Napton to Oxford, the southern extremity, is forty-nine miles one eighth; and the total length of the Oxford Canal is ninety-one miles.

By the said Oxford Canal act the company are empowered to levy a mile tonnage for coals and other merchandises carried upon this canal, which they levy accordingly, *excepting only that they are not to take a tonnage upon coals for a distance of two miles, measured from Longford towards Braunston*, respecting which it is enacted as follows:—" Provided nevertheless, and be it further enacted, that it shall be lawful for the company of proprietors of the Coventry Canal Navigation, their successors and assigns, from time to time and at all times hereafter, to take and receive all the rates and duties payable by virtue of this act for all coals that shall be carried or conveyed from any part or parts of the said intended cut or canal, within two miles from the junction thereof with the Coventry Canal at Longford aforesaid; which said rates and duties so to be collected and received, shall be and are hereby vested in the said company of proprietors, their successors and assigns, and shall and may be collected and levied by them in such manner, and with such and the like remedies and powers for collecting and levying thereof, as any rates or duties granted by this act can or may be collected or levied, and the same, when received, shall be applied and disposed of to and for the same uses, intents and purposes, as the several rates and duties granted by an act of 8 Geo. 3, entitled, ' An Act for making and maintaining a Navigable Canal from the City of Coventry, to communicate upon Tradley Heath, in the County of Stafford, with a Canal now making between the Rivers Trent and Mersey,' are thereby directed to be applied and disposed of, and to no other use or purpose whatsoever; and that it shall be lawful for the said company of proprietors of

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the navigation intended to be made by virtue of this act, to take all the rates and duties payable by the said recited act, for all goods, wares and merchandises, except coals, which shall be navigated, carried or conveyed upon any part or parts of the said canal intended to be made by virtue of this act, and afterwards upon the said Coventry Canal, within three miles and a half of the junction of the two canals at Longford, towards Coventry; which said last-mentioned rates and duties so to be collected and received, shall be and are hereby vested in the said company of proprietors of the Oxford Canal Navigation, their successors and assigns, and shall and may be collected and levied by them in such manner, and with the like remedies and powers for collecting and levying thereof, as any of the rates and duties directed to be paid by the said recited act can or may be collected and levied, and the same, when received, shall be applied and disposed of to and for the several uses, intents and purposes, as the several duties granted by this act are directed to be applied and disposed of, and to and for no other use or purpose whatsoever; any thing contained in the said recited act or this act to the contrary notwithstanding."

The said recited act of 8 *Geo. 3*, imposes a mile tonnage on coals and all other merchandises passing along the Coventry Canal.

The point of junction of the Oxford and Coventry Canals is in the respondent parish, which parish contains one mile nine hundred and sixty-three yards of the Oxford Canal, being part of the two miles above mentioned, and also two miles and a quarter of the Coventry Canal, being part of the three miles and a half above mentioned. The company of proprietors of the Oxford Canal are neither owners nor occupiers of any part of the Coventry Canal.

The Oxford Canal Company are further entitled to certain compensation tonnages, by virtue of the Grand Junction Canal act, 33 Geo. 3, c. 80, which enacts as follows:—" And whereas it being apprehended that the making of the said intended canal *will be injurious to the company of proprietors of the Oxford Canal Navigation*; it is agreed that the compensation hereinafter mentioned shall be made to them *as an indemnification against such injury*: Be it therefore enacted, that instead of the tolls, rates and duties which would have been payable to the company of proprietors of the said Oxford Canal Navigation, by virtue of certain acts of 9, 15, and 26 Geo. 3, for making and maintaining the said Oxford Canal Navigation, or any of them, for or in respect of the coals, goods, and other things hereinafter mentioned and made chargeable with certain rates to the company of proprietors of the said Oxford Canal Navigation, in case no alteration had by this act been made in the tolls, rates and duties payable to them, it shall be lawful for the company of proprietors of the said Oxford Canal Navigation to take for their own proper use and behoof the respective rates hereinafter mentioned; that is to say, for all *coals* that shall pass from the said Oxford Canal into or upon the said intended canal, the sum of 2s. 9d. a ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same shall pass on the said Oxford Canal; and for all other goods, wares, merchandises and things which shall pass from any navigable canal into or upon the said Oxford Canal, and from thence into or upon the said intended canal, or from the said intended canal into or upon the said Oxford Canal, and from thence into or upon any other navigable canal, except lime and limestone, and also except all such articles and things as are at present exempt from the payment of any tolls, rates or duties to the company

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of proprietors of the said Oxford Canal Navigation, the sum of 4s. 4d. a ton, and so in proportion for a less quantity than a ton, without any regard to the distance the same shall pass upon the said Oxford Canal."

The Oxford Canal Company are further entitled to tolls, by the following clauses of the Warwick and Napton Canal act, 34 *Geo.* 3, c. 38:—" And whereas the making the said intended canal may be injurious to the company of proprietors of the Oxford Canal Navigation, unless provision be made for preventing any such injury: Be it therefore enacted, that it shall be lawful for the company of proprietors of the said Oxford Canal Navigation to ask, demand, take and receive, to and for their own proper use, over and above all the rates of tonnage or duties which they are or shall be entitled to for or in respect of any coals, goods and merchandises, or other things navigated or passing in or upon any part of the said Oxford Canal, by virtue of any acts of parliament now in force, except as hereinafter is excepted, the rates or duties hereinafter mentioned; that is to say, for all coals which shall be navigated out of the said intended canal into the said Oxford Canal, the sum of 2s. 9d. a ton, and so in proportion for a less quantity than a ton; for all goods, wares, merchandises and things (except lime and limestone and manure) which shall be navigated out of the said intended canal into the said Oxford Canal, or out of the said Oxford Canal into the said intended canal, (except such as shall be bonâ fide navigated from the Coventry Canal,) or from any intermediate place between the said Coventry Canal and the said intended canal, into the said intended canal, the sum of 4s. 4d. a ton, and so in proportion for a less quantity than a ton."

The Oxford Canal Company are rated in the parish of Foleshill in the aforesaid sum of 2000*l.*, in manner following:—

|                                                                                                                                                                                                                                                                                                                                                                                                                       | £. s. d.         | 1829.<br>The KING<br>v.<br>OXFORD<br>CANAL<br>COMPANY. |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------|--------------------------------------------------------|
| 1. For the mile tonnage payable to the Oxford Canal Company for merchandises (not being coals) passing along the Oxford Canal, in the parish of Foleshill, for as far as such merchandises pass in that parish . .                                                                                                                                                                                                    | 450 0 0          |                                                        |
| 2. For the mile tonnage payable to the Oxford Canal Company in respect of tolls collected on the Coventry Canal, in the proportion of one mile nine hundred and sixty-three yards to two miles . . . . .                                                                                                                                                                                                              | 60 0 0           |                                                        |
| 3. For such a proportion of the compensation tonnage payable to the Oxford Canal Company under the Grand Junction Canal act, for merchandises (not being coals) passing from the Coventry Canal along the Oxford Canal into the Grand Junction Canal, and vice versâ, and consequently through the parish of Foleshill, as one mile nine hundred and sixty-three yards bears to thirty-four miles and seven eighths . | 900 0 0          |                                                        |
| 4. For the same proportion of the compensation tonnage for coals passing along the same portion of the Oxford Canal from the Coventry Canal into the Grand Junction Canal . . . . .                                                                                                                                                                                                                                   | 1090 0 0         |                                                        |
|                                                                                                                                                                                                                                                                                                                                                                                                                       | <u>2500 0 0</u>  |                                                        |
| From this sum of 2500 <i>l.</i> a deduction of 20 <i>l.</i> per cent. has been made, as the reasonable profit of a supposed lessee . . . . .                                                                                                                                                                                                                                                                          | 500 0 0          |                                                        |
|                                                                                                                                                                                                                                                                                                                                                                                                                       | <u>£2000 0 0</u> |                                                        |

Which leaves the sum of 2000*l.* as the supposed rental of the above-mentioned tolls, and upon which the rate has been made. The mile tonnage payable to the Coventry Canal Company, for coals passing along the Oxford Canal, in the parish of Foleshill, is 350*l.* The parochial rates on landed property in Foleshill, payable by the occupiers, are six shillings in the pound on the amount of their actual rents. The sum which the Oxford Canal Company receive upon all their compensation tonnages, taken in the proportion of one mile nine hundred and sixty-three yards to ninety-one miles, is 1000*l.*; the

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expense of collecting the tolls for which the company are assessed is 5*l.* per cent. The annual repairs of the canal in the parish of Foleshill amount to 20*l.* The annual repairs of the *whole* canal amount to 4000*l.* The expense of works, (such works not being situated at Foleshill,) by which that part of the canal which lies in the parish of Foleshill is supplied with water, amounts to 100*l.* The works by which that part of the canal which lies in the parish of Foleshill is supplied with water, supply the canal for a distance of forty miles. The total amount of the tolls collected on the canal is 50,000*l.* The tolls payable throughout the said distance of forty miles, estimated on the principle of the assessment in the parish of Foleshill, amount to 25,000*l.* The questions for the consideration of this Court are,

First, For what tolls, and for what proportions of such tolls, are the Oxford Canal Company ratable in the respondent parish?

Secondly, To what deduction are the Company entitled, to place them on an equal footing with the other occupiers of land in the same parish?

The rate is to be amended accordingly.

*Amos*, in support of the rate, and of the order of sessions. First, the Oxford Canal Company are ratable "for the mile tonnage payable to them for merchandises (not being coals) passing along the Oxford Canal, in the parish of Foleshill, for as far as such merchandises pass in that parish." This is clear upon the principle laid down in *Rex v. Milton* (a), and recognised in subsequent cases (b), namely, that every parish through which a canal passes is entitled to receive from the canal com-

(a) 3 B. & A. 112.

*ante*, 424; 1 M. & R. 711; 9 B.

(b) See *Rex v. Kingswinford*,  
*ante*, i. 43; 1 M. & R. 20; 7 B.  
 C. 236; *Rex v. Lower Milton*,

& C. 810; and the various authorities therein referred to.

pany, out of the general fund arising from the tolls, a sum proportionate to that which the land used by the company in that parish produces. Secondly, the Oxford Canal Company are ratable "for the mile tonnage payable to them in respect of tolls collected on the Coventry Canal, in the proportion of one mile nine hundred and sixty-three yards to two miles." The Oxford Canal Act vests in the Oxford Canal Company certain tolls earned on the Coventry Canal in respect of all merchandises (except coals) for the distance of three miles and a half on the Coventry Canal. The same act vests in the Coventry Canal Company the tolls for coals passing on the Oxford Canal for a distance of two miles measured from Longford, the point of junction, towards Braunston. In effect, the Oxford Canal Company give to the Coventry Canal Company two miles of their canal, part of which is in the parish of Foleshill, and receive from them the tolls earned on three miles and a half of the Coventry Canal. But the profit is produced by the two miles of the Oxford Canal, part of which is in the parish of Foleshill, and is, consequently, ratable in that parish. Thirdly, the Oxford Canal Company are ratable "for such a proportion of the compensation tonnage payable to them under the Grand Junction Canal Act, for merchandises (not being coals) passing from the Coventry Canal along the Oxford Canal into the Grand Junction Canal, and vice versâ, and consequently through the parish of Foleshill, as one mile nine hundred and sixty-three yards bears to thirty-four miles and seven-eighths." It is presumed that this proposition will not be disputed, for it is founded upon the decision of this Court in *Rex v. The Oxford Canal Company (a)*, which is expressly in point. Upon the same principle it will follow that, fourthly, the Oxford Canal Company are

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(a) 6 D. & R. 86; 4 B. & C. 74.

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ratable "for the same proportion of the compensation tonnage for coals passing along the same portion of the Oxford Canal from the Coventry Canal into the Grand Junction Canal." There can be no distinction between the compensation tonnage for coals and that given for other merchandises; or, if there is, it lies upon the other side to shew it: because, according to the decision in *Rex v. The Oxford Canal Company*, the compensation tonnage in this case is divisible among the parishes used by the Grand Junction Canal Company in earning that tonnage. The Grand Junction Canal Company, upon the supposition that they might have occasion to use the Oxford Canal, gave the Oxford Canal Company a compensation for that use in the shape of a toll of 2s. 9d. on coals, and 4s. 4d. on other merchandises. That supposition has been realized, the Grand Junction Canal Company have used that part of the Oxford Canal which lies in the parish of Foleshill, for the passage of coals out of the Coventry Canal from Longford to Braunston. It follows that the Oxford Canal Company are ratable for such proportion as their land lying in the parish of Foleshill bears to the entire distance. The question of ratability being thus disposed of, the only remaining question is, what deductions from the gross amount of the tolls are to be made in favour of the Oxford Canal Company. The principle upon which that question must be decided, is this, that the rent is the criterion of the value of the occupation of the land; *Rex v. The Trustees of the Duke of Bridgewater (a)*. It was there decided, that the proprietors of a canal were ratable in respect of their occupation of land, upon the sum for which the land would let, and not upon the net produce of the land. Here, in fixing the rate, a deduction of 20/. per cent. has been made, "as the reasonable profit of a

(a) *Ante*, 139; 4 M. & R. 143; 9 B. & C. 68.



supposed lessee," and the residue of the tolls has been rated as the amount of annual rent which a tenant would pay. [*Parke, J.* The poor rate certainly ought to be deducted, for if a tenant pays the poor rate he will pay so much less rent to his landlord.] Upon that principle, undoubtedly, it does seem just that the poor rate should be deducted.

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*Hill, contra.* It is not intended to dispute the ratability of the Oxford Canal Company, so far as respects the first three items mentioned in the rate; but it is confidently submitted that they are not ratable in respect of the compensation tonnage for coals mentioned in the fourth item. The term "compensation tonnage" implies that such tonnage was given in lieu of something given up. But the Oxford Canal Company gave up nothing for which they were ratable; therefore, they are not ratable for the compensation. The Coventry Canal was in work before the Oxford Canal was made. The Oxford Canal Company take the tonnage mentioned in the third item of the rate. The Coventry Canal Company take a tonnage for coals on a certain part of the Oxford Canal, covering the whole of the parish of Foleshill. Therefore, when the Grand Junction Canal Act was passed, the Oxford Canal Company had no tonnage for coals passing through the parish of Foleshill. [*Parke, J.* Surely under the act of 33 *Geo. 3*, the canal in Foleshill may be used for the purpose of carrying coals.] Not so as to afford a profit to the Oxford Canal Company, and, therefore, not so as to render them ratable. [*Parke, J.* They received the compensation tonnage as an indemnification against the injury they were supposed likely to sustain by means of the formation of the Grand Junction Canal.] The Coventry Canal Company have still what they originally had, the mileage tonnage upon coals

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passing through the parish of Foleshill. If that which has been called compensation tonnage is to be considered as an indemnification against the general injury to the Oxford Canal, it ought to have been given in the proportion which the length of that part of the canal that is in the parish of Foleshill bears, not to the length of that portion of the canal which lies between the parish where it joins the Coventry Canal and Braunston, but to the whole line of the canal. When the Grand Junction Canal Act passed, the mileage was *1d.* per ton for coals, and *1½d.* for other goods. The compensation tonnage of *2s. 9d.* and *4s. 4d.* was evidently computed with reference to the *1d.* and *1½d.* per mile. The mileage for coals at *1d.* for  $34\frac{1}{2}$  miles would be *2s. 10½d.* But the Coventry Canal Company was then entitled to the mileage over 2 miles. Deducting then *2d.* from the *2s. 10½d.*, and giving the party to be indemnified the benefit of the fraction, the compensation tonnage for coals would be reasonably fixed at *2s. 9d.* The compensation tonnage therefore proceeds upon the principle that the Oxford Canal Company had no tonnage over these two miles; and the legislature has not made the public pay double tonnage in the parish of Foleshill, which it would have done if the portion of the canal which is in that parish had been considered the meritorious cause of earning a portion of the compensation tonnage. Coals now pay and always did pay to the Coventry Canal Company mileage for that part of the canal which is in Foleshill, and if the *2s. 9d.* a ton relates to that portion of the canal coals would in Foleshill pay double tonnage. In order to make a canal ratable, there must be not only a user of it in the parish, but a profitable user. Here, there was no profitable user of the canal by the Oxford Canal Company in respect of the carriage of coals in the parish of Foleshill. The only remaining question is,

what deductions ought to be made; in other words, what proportion of the total amount of tolls received ought to be considered as constituting the sum for which that part of the canal which lies within the parish of Foleshill would let to a tenant. As there has never in fact been any tenant, but the canal has remained in the hands of the proprietors, who have collected the tolls themselves, it is not very easy to ascertain that amount with precision. It is, however, admitted, supposing the canal to be let, that the tenant ought to have a profit of 20l. per cent. That must be taken to mean a net profit; a profit resulting after deducting all payments made in respect of the canal: therefore, the poor rate, the expense of collecting the tolls, and the expense of annual repairs, ought to be deducted from the total amount of tolls received. Now the annual repairs of that part of the canal which lies in the parish of Foleshill amount to 20l.; and the annual repairs of the whole line of the canal amount to 4000l.: there may be a question, therefore, whether the sum to be deducted should be such a proportion of the total amount of repairs as the length of canal in the parish of Foleshill bears to the whole line of the canal, or only the amount of repairs incurred in that part of the canal which lies in the parish of Foleshill. [*Bayley, J.* I feel no doubt upon that question. The rate must be in proportion to the value of the land in the parish where the rate is made; therefore all expenses incurred in repairing that part of the canal in that parish must be deducted.] The expense of supplying water for the canal must also be deducted. It is analogous to the expense of supplying manure for the cultivation of land. The real value of land is its value after deducting the expenses of cultivation. Without a supply of water the canal could never produce any profit at all. [*Bayley, J.* No doubt there must be a deduction in that

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respect. The sessions must compute the quantum. We can only lay down the principle. We never compute the quantum, except where the sessions tell us the principle upon which they have calculated the quantum, and their calculation is evidently erroneous.] The case finds that the works by which that part of the canal which lies in the parish of Foleshill is supplied with water, supply the canal for forty miles. The true principle, therefore, will be to fix the quantum in the proportion which the part of the canal situate in the parish of Foleshill bears to forty miles.

BAYLEY, J., after conferring with the other judges.—The principle which we lay down is this:—The sessions must make an allowance for the proper proportion of the expense of supplying water; and they must make allowance for the poor rate, the expense of annual repairs, and the expense of collecting the tolls. The only question for our consideration is, whether any part of the compensation tonnage can be regarded as having been earned in the parish of Foleshill. With reference to that question we shall take time to consider of our judgment.

*Cur. adv. vult.*

BAYLEY, J.—The several questions which were argued on both sides, in this case, were disposed of in the course of the argument, except that arising upon the fourth item of charge on the company mentioned in the special case. It was contended that the company were not ratable in respect of a proportion of the compensation tonnage for coals passing along the portion of the Oxford Canal lying in the parish of Foleshill, from the Coventry Canal into the Grand Junction Canal, because it was said that the tonnage on coals was a compensa-

tion to the company for the injury done by the construction of the Grand Junction Canal, pursuant to the 33 Geo. 3, c. 80, to their former coal tonnage; and that as the company had, before the passing of that act, no coal tonnage in the parish of Foleshill, no part of the compensation tonnage could be considered as earned in that parish. It was further urged that the new tonnage dues were given by that act *instead* of the old dues, and must be considered as standing, with respect to their ratability, in the same situation. Upon reference, however, to the Grand Junction Canal Act, it would seem that the new coal tonnage is not given as a compensation for the injury done to the company, in respect of the old coal tonnage, *specifically*. The recital shews that it was given because it was apprehended that the intended canal would be injurious to the Oxford Canal *generally*, and that certain compensations ought to be made for that *general* injury; and the legislature thought that an indemnification would be given by certain new dues upon coals and other goods carried to or from the intended canal by means of the Oxford Canal, without regard to the distance they might be carried on the latter. And these new dues do not appear to be *in addition* to the old dues, but the public are to pay one class of dues only; and this seems to be the meaning of the introductory words of the clause, making them payable *instead* of the former tolls. The Grand Junction Canal would probably benefit the Oxford Canal in that part of it which formed the line of communication between that and the Coventry Canal, namely, from Longford to Braunston, and it would probably be in other parts where they to a certain degree were parallel, namely, from Napton to Oxford, that the injury would occur: and the intention probably was to recompence the injury in one part by compensation in another.

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The question, however, is, not for what injury the right to receive the new tonnage dues is given as a compensation; or, in other words, for what reason the legislature have given that right to the Oxford Canal Company; but, what is the legal liability of the company in respect of these dues, when received by them, to contribute to the poor rate. The Company are ratable in each parish for the net annual profit of the portion of the canal lying in that parish; in other words, for what the canal earns in each parish; and the tonnage dues are paid by the owners of goods *for passing along the canal*, and are received by the company *for the use of the canal*, though the reason of their being enabled by the legislature to receive them was, that their canal was likely to be injured by the new navigation. It was upon this ground, that these dues were received for the use of the canal, and were earned by the canal, that the company were held ratable in respect of them in *Rex v. The Oxford Canal Company (a)*. For the passage of coals, therefore, along the part of the canal lying in the parish of Foleshill, some portion of the new dues is received by the company, and in respect of that portion the rate is proper.

It is true that the consequence of this will be, that for coals passing along that part of the canal lying within two miles from the junction with the Coventry Canal, the company will receive more dues, and therefore be ratable for more, than for those passing along other parts of the canal; because they will receive for such coals the proportion of compensation dues above mentioned *directly*, and *indirectly* a part of the tonnage dues on other goods on the first three miles and a quarter of the Coventry Canal, for which it is admitted by their counsel that they were properly rated in the rate in question.

(a) 6 D. & R. 86; 4 B. & C. 74.

But this consequence can make no difference in the construction of the act of parliament, which makes the dues payable by the public to the company *for passing along their canal*, so that those dues constitute a part of the profits of that portion of the canal along which they pass.

The canal earns no part of the *original* tonnage upon coals carried along the two miles in the parish of Foleshill into the Coventry Canal, because it receives its *equivalent* by means of the tonnage upon other goods for the first three miles and a half upon the Coventry Canal; but those two miles contribute to earn the *compensation* tonnage, and for that there is no equivalent.

The rate is therefore to be confirmed in this respect; but the case must be referred back to the sessions to make the several deductions to which the company were held, upon the argument, to be entitled.

Rule accordingly.

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The KING v. WILLIAM HODGKINSON.

AT the Quarter Sessions for the county of Derby, a conviction under 50 Geo. 3, c. 41, was confirmed, subject to the opinion of this Court on the following case:—

Yeast is a *victual* within the exception in 50 Geo. 3, c. 41, (Hawkers' and Pedlars' Act.)

The defendant, who had been for some time past in the habit of purchasing yeast at Burton, and carrying the same about to the neighbouring towns and villages, and selling it for the purpose of being used in the making of bread and beer, took a quantity of yeast to Litchurch, in the county of Derby, on the 14th November, 1828, and there exposed the same to sale in his usual way, without a hawker's licence. The question for the opinion of the Court is, whether the yeast so exposed to sale is

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to be considered as victuals within s. 23 of 50 Geo. 3, c. 41 (a).

*N. R. Clarke*, in support of the Order of Sessions. Yeast is not *victuals*, by which must be understood that which is in a state fit to be eaten; it is merely a substance used in the preparation of victuals. *Rex v. Waddington* (b) was cited below for the defendant. There, however, it was not necessary to consider this point. In *Rex v. M'Gill* (c) it was held, that selling tea as a hawker required a licence. [*Bayley, J.* That was prohibited by a former statute.] The Court said it was a double offence. Yeast is not victuals in common parlance. It is not even an ingredient in a victual, but merely a substance applied to cause fermentation, and thereby render the bread lighter.

*Fynes Clinton*, on the same side. *Rex v. M'Gill* is quite conclusive. Hops would seem not to be within the 5 & 6 Edw. 6, c. 14 (d). In the case of *Rex v. Waddington*, however, it was determined, on looking at the words of that act, that as growing corn could not be treated as victuals, the words of the statute must be considered as shewing the intention of the legislature, that every thing which might in any shape become victuals should be included in the prohibition against forestalling. Here, the word victuals is found in company with fish

(a) By which it is provided and enacted, "That nothing in this act shall extend to prohibit any person or persons from selling (inter alia) any fish, fruit, or victuals."

(b) 1 East, 143.

(c) 3 D. & R. 377; 2 B. & C. 142.

(d) Which prohibited the engrossing of "any corn growing in the fields, or any other corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, with intent to sell the same again." Repealed by 12 Geo. 3, c. 71.



and fruit only; which shews that nothing was intended to be exempted, except that which is sold in a state fit to be used as food.

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*Brodrick*, contra. Yeast is a victual within the meaning of this act; it comes from one victual, and forms a necessary ingredient in another. *Rex v. M'Gill* was a case depending upon the construction of 10 *Geo.* 1, c. 10, s. 14, and 9 *Geo.* 2, c. 35, s. 20. The restrictions in these statutes upon the sale of tea, rendered it impossible that that article should be exempted from the operation of the Hawkers' and Pedlars' Act; nor was the exception urged. Beer and wine are considered as victuals by 12 *Edw.* 4, c. 8. By 12 *Edw.* 4, c. 8, beer is expressly made a victual. [*Bayley*, J. Whatever contributes to the support of life is a victual.] By 55 *Geo.* 3, c. 99, yeast is recognized as an ingredient in making bread. In 3 *Inst.* (a) it was adjudged that salt is a victual, because it not only is necessary itself for the food and health of man, but that it seasoneth and maketh wholesome beef, pork, &c., butter, cheese, and other viands. To hold that yeast is not within the exception, would have the effect of imposing a most inconvenient restriction upon the sale of an article of very general use.

LORD TENTERDEN, C. J.—The word “victuals” in this statute may fairly be understood to comprise every thing which constitutes an ingredient in food, and to extend, therefore, to this article, which is generally, though not, perhaps, necessarily, used in the making of bread.

BAYLEY, J.—*Rex v. M'Gill* was a case totally different from the present. It was not there agitated whe-

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ther tea came within the exception in the 23d section of the Hawkers' and Pedlars' Act. I do not think that tea would come within that exception, because the sale of tea, under such circumstances, was already illegal. The true construction of this section has been pointed out by my lord.

LITTLEDALE, J., concurred.

Order of Sessions quashed.

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The KING v. The TREASURER of the County of the  
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Where an indictment for felony is removed by certiorari, and tried at Nisi Prius, neither the Judge at Nisi Prius nor this Court has authority to award costs to the prosecutor under 7 Geo. 4, c. 64, s. 22, whether the indictment be removed by the prosecutor or by the prisoner.

*COLERIDGE* had obtained a rule calling upon the defendant to shew cause why he should not pay to the prosecutor the expenses of the prosecution of an indictment for felony against one *Ellis*. A former application for the expense of a former conviction had been granted.

*Crowder* now shewed cause. Six indictments were removed by the prisoner, one of which only was tried. At the trial the learned Judge doubted whether he had any power to give the prosecutor his costs. The rule was granted for the costs of that prosecution only; nothing was said about the costs of the other five, although they are now included in the rule. The Court has no power to give the prosecutor his costs. The words of 7 Geo. 4, c. 64, s. 22, are, " That the Court before which any person shall be *prosecuted or tried* for any felony, is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpoena to prosecute or give evidence against any person accused of any felony,

to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur," &c. The Judge before whom the felony was tried is the person most competent to form a judgment as to the propriety of allowing costs.

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*Coleridge*, in support of the rule. It is now too late to re-agitate the question whether this Court has authority to award these costs. The provisions of 58 Geo. 3, c. 70, s. 4, differ but slightly from the subsequent enactment of 7 Geo. 4, c. 64, s. 22. The cases upon 7 Geo. 4 are cases of misdemeanour removed by the *defendant*. Even when a bill is thrown out, it is the constant practice to apply for costs. [Lord *Tenterden*, C. J. If we have done wrong before, we will not amend the rule for the purpose of giving you the costs of the other indictments. We have since considered the point. *Littledale*, J. The act only applies to indictments tried before the Courts in which they were found.] This view of the statute would put it in the power of the prisoner to deprive the prosecutor of his costs.

LORD TENTERDEN, C. J.—If the costs of the prosecution could be granted at all, they ought to be granted by the Judge who tried the prisoner.

LITLEDALE, J.—Even the Judge has no power where the case has been removed by *certiorari*. There is no difference in substance between an indictment removed by the prisoner and an indictment removed by the prosecutor.

Rule discharged (a).

(a) See *Rex v. Richards*, *ante*, i. 443; 2 M. & R. 405; 8 B. & C. 420.

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## The KING v. The Inhabitants of BELFORD.

A burgess receiving, by the allotment of the burgesses, a portion of the rent of lands held by the borough, does not gain a settlement by estate.

UPON an appeal against an order of two justices, whereby *Grace*, the wife of *John M'Queen*, then a prisoner in the gaol of Berwick, and their children, were removed from Berwick-upon-Tweed to Belford, in the county of Northumberland, the sessions confirmed the order, subject to the opinion of this Court upon the following case:—

The pauper, *J. M.*, being a burgess of Berwick-upon-Tweed, and being then settled in Belford, came in 1807 to reside at Berwick-upon-Tweed, where he continued up to the date of the above order, at which time he was a prisoner in Berwick gaol, and his wife and five children became chargeable to the parish of Berwick-upon-Tweed. For the last three years of his residence in the parish of Berwick-upon-Tweed the pauper enjoyed, as such burgess, certain pecuniary benefits arising out of the estates of the corporation lying in the same parish, in the manner after mentioned. The mayor, bailiffs, and burgesses of the borough of Berwick, by virtue of a charter granted 1 *Jac.* 1, and confirmed by act of parliament, hold, to the use of them and their successors, a large estate in land, situate in the parish of Berwick-upon-Tweed, which parish is co-extensive with the borough. This estate is chargeable in the first instance with the payment of salaries of officers and other corporation expenses imposed by the charter, but has from an early period after the grant of the charter, and from thence hitherto, been distributed into three portions, and each portion applied to distinct purposes. The first portion consists of several farms, which are demised to tenants by the mayor, bailiffs, and burgesses, the rent being reserved to the mayor, bailiffs, and burgesses, or to their treasurer for the time being, and collected by him.

This rent, together with the proceeds of other property, called the Town's Ancient Revenue, now forms a separate fund, out of which the salaries of the officers and other corporate expenses authorized by the charter are defrayed. These farms are called "Treasurer's Farms." The second portion is subdivided into several parcels, varying in quantities from an acre and a half to two acres and a half, and in value from 2*l.* to 9*l.* per annum. These are called Meadows; and at an annual meeting of the burgesses, called "a Meadow Guild," are distributed, as they become vacant by the death or non-residence of the last occupiers, among the senior resident burgesses and widows of burgesses who succeed to the rights of their husbands as to meadows and stints, though the charter has no provision in behalf of the widows, the eldest resident burgess being entitled to chuse the most valuable vacant meadow, and so in succession down to the junior, till the number of vacant meadows is exhausted. The burgesses may either occupy those meadows themselves or let them to tenants, reserving the rents to themselves. The lands forming the third portion were, up to the year 1761, open fields, upon which each burgess was entitled to a certain right of depasturing; but at that period they were inclosed, and have ever since been let in guild, as farms, to tenants for various terms of years, and are now demised by lease under the corporation seal, and the rent has been, since the year 1810, uniformly reserved to the mayor, bailiffs, and burgesses, (which is the name of incorporation,) their successors or assigns, or to their treasurer for the time being. Previously to that period, however, several instances occur of leases of stint land, wherein the reservation of the rent was made "to the mayor, bailiffs, and burgesses, their successors or assigns, or to their treasurer for the time being, or to the several respective

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burgesses or burgesses' widows who should from time to time during the said term have shares in the said farms held in equal portions." The rent of each farm is divided into a certain number of equal portions, generally eleven, but in a few instances twenty-two. At another annual meeting, called "a Stint Guild," a portion is allotted upon a specific farm to each resident burgess or burgess's widow, or to as many of these as there are vacant portions. These portions are called "Stints," and they, like the meadows, vary in value from 2*l.* to 9*l.* per annum, the senior burgesses being in like manner entitled to a preference as the more valuable stints become vacant, the younger burgesses succeeding as vacancies, by the death, removal, or promotion of their seniors, occur. The portions of the rents called stints are paid annually by the treasurer of the corporation to the burgesses who are entitled to them; but, until the last fourteen or sixteen years, the burgesses in many instances received their stint money immediately from the farmers or lessees of the specific farms upon which their several stints were assigned. The burgesses in guild have, by their charter, a power of making bye-laws for the good rule and government of the corporation, and for the better preserving, governing, disposing, letting, and demising of their lands, &c. In the exercise of this right the burgesses assembled in guilds make bye-laws to regulate the enjoyment of the meadows and stints, and have prescribed the conditions of husbandry under which meadow and stint lands may be broken up and converted into tillage, and (in the case of the meadows) the terms for which they may be let by the individual burgesses to whom they are allotted. They also decide upon the title of those who claim to enjoy meadows and stints according to such bye-laws; and instances occur upon the records, of forfeitures, both of

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meadows and stints, either absolute or for limited periods, inflicted by the burgesses in guild for infraction of bye-laws or other gross misconduct. But unless there be such forfeiture, or the party either become non-resident or relinquish his stint or meadow by chusing one of more value, he may remain in the enjoyment of the stint or meadow which has at the first been allotted to him for the term of his life. Some burgesses are permitted to enjoy one stint only, others two stints, and others again one meadow and one stint. Those who enjoy two stints are said to hold one of the stints for or in lieu of a meadow. The pauper was for the three years next preceding this order of removal, and still is, in the enjoyment of one stint assigned within the parish and borough of Berwick-upon-Tweed, called the Burrs, and annually receives from the treasurer of the corporation, for his portion of the rent, the sum of 3*l.* 5*s.* 9*d.* He is also in the enjoyment of another portion assigned upon another farm, called No. 12 of the outfields, under the description of "stint for a meadow;" his share of the rent of the last named farm being 3*l.* 1*s.* 9*d.* The rents of these two farms are now and during all the time of the pauper's sharing in them have been reserved to the mayor, bailiffs and burgesses, or to their treasurer, and these rents are received by the treasurer, and the above are paid to the pauper by him. The pauper is not at present entitled to a meadow, but he will be entitled (if he so long live) to claim one as soon as a vacancy occurs in regular rotation. The pauper, in his character of a burgess of the borough of Berwick-upon-Tweed, is a member of the assemblies of burgesses, called guilds, held under the provisions of the charter or otherwise, and, therefore, entitled to a vote as well in the meadow and stint as in other guilds.

The question for the opinion of this Court is, whether

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the pauper *John M'Queen* was, during his residence under the above circumstances in the parish of Berwick-upon-Tweed, irremovable therefrom so as to acquire a settlement in the said parish.

*Ingham*, in support of the order of sessions. No land in the parish was held by the pauper, or in trust for him; *Rex v. Stone* (a). An indirect interest in the land is not sufficient; as an annuity charged upon the land, *Rex v. Stockley Pomroy* (b), a right of dower before assignment, *Rex v. Northweald Bassett* (c), a distributive share before administration granted, *Rex v. Widworthy* (d), *Rex v. North Curry* (e), *Rex v. Berkswell* (f), a licence to occupy, *Rex v. Horndon on the Hill* (g), or a doubtful equity, *Rex v. Toddington* (h). Here the burgesses have at the most only a right to call upon the treasurer to account to them for the rents allotted to them respectively. If the corporation were dissolved, the lands would revert to the heirs of the donors without regard to the individual members; 8 *Vin. Abr.* (i). (He was here stopped by the Court.)

*Alderson*, contra. The pauper was irremovable, *Rex v. Warkworth* (k), and therefore gained a settlement. The burgesses have the power of determining in what manner the land shall be occupied. The receipt of rent is equi-

- (a) 6 T. R. 295.  
 (b) Burr. S. C. 762.  
 (c) 4 D. & R. 276; 2 B. & C. 794.  
 (d) Burr. S. C. 109.  
 (e) Caldec. 137.  
 (f) 3 D. & R. 9; 1 B. & C. 542.  
 (g) 4 M. & S. 562.  
 (h) 1 B. & A. 560.

- (i) 8 *Vin. Abr.* Corporation, H. 3, pl. 9. Upon the dissolution of monasteries in the reign of *Henry 8*, the reversionary interest of the heirs of the respective donors was destroyed by an act of parliament, which vested the fee simple in the crown.  
 (k) 1 M. & S. 473.



valent to actual enjoyment of the land. The pauper is entitled to be present at the guild at which the lands are let. His removal would deprive him of that privilege, and of his undivided share of the rent. He is, therefore, irremovable. [*Bayley, J.* He has a right to vote whether entitled to a stint or not.] A mere claim is sufficient. *Rex v. Staplegrave (a)*. [*Bayley, J.* That was the case of a reversioner who went to reside on what he believed to be entirely his own estate; and he could not have been removed until the parish officers had found the deed creating the term.] The pauper had not then the right which he claimed, though the parish officers were not prepared to disprove it. The decision of the Court proceeded on the ground that a coming to settle under such circumstances was not within the prohibition of the statute of *Car. 2*.

*T. Greenwood*, on the same side. By Magna Charta, disseisins are prohibited not only where a person has a freehold but where he has a franchise of any kind (*b*). He is, therefore, irremovable from such franchise (*c*). The rule was first narrowed in *Rex v. Warkworth*. There, however, the party was merely entitled to a right of common which he had not the means of exercising; here he has a specific rent-charge issuing out of the particular land. [*Bayley, J.* No burgess is seised in his individual capacity.]

Lord TENTERDEN, C. J.—I am of opinion that the pauper is not seised of any estate legal or equitable.

(a) 2 B. & A. 527.

(b) Cap. 29. Nullus liber homo — disseisiatu de libero tenemento vel libertatibus vel liberis consuetudinibus suis —

nisi per legale iudicium parium suorum vel per legem terræ.

(c) And see *Rex v. Aythrop Rooding*, Burr. S. C. 414.

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The estate is in the corporate body; and it is immateria. whether the corporation allowed the pauper to enjoy the whole or a certain portion of the rents, or assigned to him the rent of a particular estate. The pauper had no right to enter upon the land or to make over his interest to another. He was entitled even to the rent only so long as the corporation pleased.

BAYLEY, J.—*Rex v. Warkworth* shews that the possession of a right of common is insufficient. Here, the pauper had no estate either legal or equitable. The rent is dealt out under the bye-law as the burgesses think proper.

LITTLEDALE, J.—The pauper had no right to occupy the land.

PARKE, J.—The pension was determinable at the pleasure of the corporation.

Order of Sessions confirmed.

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 BROWNE v. CUMMING and others.

Where a party suing for a malicious prosecution, had obtained a copy of the indictment by virtue of the attorney-general's fiat, granted under a mis-state-

THE plaintiff, a bankrupt, was indicted for concealing the sum of 24*l.* 15*s.* At the trial before *Burrough*, J., at the Bridgewater assizes, 1827, the plaintiff was acquitted; upon which his counsel, *Bompas*, Serjt., applied to the learned judge for a copy of the indictment. This his lordship refused to grant. Upon a representation made to the attorney-general that the

ment as to the view entertained by the judge before whom the indictment was tried, the Court refused to stay the proceedings or to prevent the plaintiff from using on the trial the copy so obtained. *Semble*, that the indictor is entitled, as of right, to a copy of the record of acquittal.

learned judge had changed his mind, and would now grant the application if he had power to do so, the attorney-general(a) gave his fiat for the granting of a copy; but upon the learned judge's stating that his views had been misrepresented, a rule was obtained, calling upon the plaintiff to shew cause why he should not be restrained from using such copy of the indictment.

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*C. F. Williams* and *Bompas*, Serjt., now shewed cause. The learned judge had no power to withhold from the plaintiff a copy of the indictment. *Præf.* 3 *Coke Rep.* 2. 1 *Mann. & Ryl.* 279, n. (a). By the Parliament Roll there vouched, the right of all persons to free access to records in which they are interested is fully recognized. The first restriction upon this right was made by an order of some of the judges at the Old Bailey immediately after the Restoration. Here the learned judge thought, that under the seventh resolution he had no power to make an order for a copy of the indictment. In *Jordan v. Lewis*(b), the plaintiff offered in evidence the copy of an indictment which had been granted to his co-indictee only; and upon its being objected, under the Old Bailey order, that a copy could not be read, *Lee*, C. J. said, that he could not refuse to let the plaintiff read it, and the Court refused to set aside the verdict obtained by the plaintiff on this evidence. The same point was decided in the late case of *Caddy v. Barlow*(c), where the Court refused to entertain the question, as to the alleged fraudulent manner in which the copy had been obtained. It is true that *Foster*, J. says, that the statute 46 *Edw.* 3 relates to those records in which the subject may be interested, as matters of evidence upon questions of private right; and

(a) *Sir Charles Wetherell.*

(c) *Ante*, i. 84; 1 *M. & R.* 275.

(b) 2 *Stra.* 1122.

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he cites what passed at Lord *Preston's* trial, which does not support the distinction taken. But supposing the copy to have been irregularly obtained, that circumstance would only furnish the ground for an application to the discretion of the Court. In *Rex v. Brangan(a)*, the prisoner being acquitted upon an indictment which appeared to have been brought merely for the purposes of vexation and oppression, his counsel applied to the Court for a copy of the indictment, *Willes*, C. J. acknowledged that the prosecution bore the strongest marks of being unfounded and malicious, but refused the application, because it was not necessary that he should grant it; declaring that, by the laws of this realm, every prisoner, upon his acquittal, had an undoubted right and title to a copy of the record of such acquittal, for every use they might think fit to make of it; and that after a demand of it had been made, the proper officer might be punished for refusing to make it out.

*Scarlett*, A. G. contra. The defendants are entitled to have the rule made absolute upon a very narrow ground. The fiat was obtained under a misapprehension as to the view taken of the case by the learned judge who tried the cause. Upon that mistake being discovered, the plaintiff ought to have gone again before the attorney-general, and have discussed the merits of the application. The plaintiff has received a copy of the indictment upon a representation which appears at least to be founded on mistake. If, as contended on behalf of the plaintiff, he has a right to have a copy of the indictment, this rule will not prevent him.

Lord TENTERDEN, C. J.—Upon the whole we think

(a) 1 Leach, C. C. 32.

the mistake or misapprehension not to be of such a nature as to justify the interference of the Court.

Rule discharged.

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Lord of the Manor of Hampstead, and WILLIAM  
LYDDON, his Steward of the said Manor.

A MANDAMUS issued to the lord of the manor of Hampstead and his steward, commanding them to admit *Joseph Walmsley*, the heir at law, according to the custom of the manor, of *Henry Flitcroft*, deceased, to the immediate tenancy in possession of certain estates held of the manor (a) by copy of court roll, of which

(a) This expression is somewhat incorrect. The copyholds are within and parcel of the demesnes of the manor; they are not held of the manor, but are ipsum manerium. Lands held of the manor are those lands which having been formerly parcel of the manor were severed from it by subinfeudation before the passing of the statute of *Quia Emptores*, in 1290 (in the case of a manor held of a subject), or before the statute *De Prærogativâ Regis*, in 1324 (in the case of a manor held of the crown). These subinfeoffees became the freehold

tenants of the lord, the barons of his curia baronum. Their lands were no longer parcel of the manor, but were held of the manor, or, to speak with more precision, they were held of the lord, as of his manor, *ut de manerio*. The services of these tenants are parcel of the manor, and so much so, that if their services be destroyed or severed from the demesnes, the manor has no longer a legal existence. One of these services, namely, the secta ad curiam baronum, is so essentially parcel of the manor that it is said that upon the number of suitor-free-

The lord of a manor is bound to admit the customary heir of a copyholder in fee, although there be a surrender to the use of a will, and a devise by the surrenderer, there being no claim of admittance on the part of the devisee.

So, although it appears (upon the return to a mandamus) that the non-claim of admittance on the part of the devisee, is the result of a contrivance between him and the customary heir to deprive the lord of the fine which would be payable upon the admittance of the devisee.

In the case of a devise of copyhold sur-

rendered to the use of the will, the estate descends upon the heir, subject to contingency of being devested by the admittance of the devisee.

No disclaimer by the devisee is therefore necessary to vest the estate in the heir.

A copyhold may be disclaimed by parol, or by other matter in pays.

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*Flitcroft* had died seised, besides the estates held of this manor, to which *Wulmsley* had been already admitted, or to shew cause to the contrary. This writ was founded upon a suggestion, first made by affidavit upon the motion for the mandamus, and afterwards inserted in the writ, that *Hampstead* is an ancient manor, *within* (a) which are various copyhold tenements *parcel of the said manor* (a), and granted by and held of (b) the lord of the manor, according to the custom of the

holders being reduced so low that no court baron can be held, the estate ceases to be a manor in law, and is only a manor in reputation. By this expression, however, nothing more seems to be meant than this: a court baron is a necessary incident to a manor; if, therefore, the power of holding a court baron be destroyed, the estate, though retaining its manerial character in every other respect, can no longer be legally designated as a manor. If, therefore, the lord were to release to his freehold tenants the suit of court, the manor would be as effectually destroyed or reduced to that imperfect state in which it receives the rather inappropriate name of a manor by reputation, as if all the freeholds had escheated, or as if the lord had aliened his seigniorship over these freeholds. Where a manor has become an imperfect manor, or a manor in reputation, by the destruction of all the suit-rendering tenements except one (or perhaps two), it would seem that the manor would revive when-

ever the remaining freehold tenement was divided amongst several tenants holding in severalty, or even as tenants in common, since each of these new tenants would owe suit at the court baron, such suit not being a service arising out of custom, but a service necessarily incident to a seigniorship by the common law. The reduction, therefore, of the number of the freehold tenants to one (or two, if three be necessary to constitute a court baron,) seems rather to create a *suspension* than an extinction of the manor. So it would appear that the manor would be suspended if the lord made a lease for years of the services of his freehold tenants, as during the term the tenants would owe suit and service at the court of the lessee, who, not being lessee of the demesnes, would not be lord of the manor even during the term.

(a) The copyholds are *within* and *parcel of* the manor.

(b) These words would apply to the lands of the freeholders or tenemental lands. With re-

manor, and demised and demisable (a) by copy of court roll of the manor by the lord of the manor for the time being, according to the custom of the manor, to any person or persons willing to take the same in fee-simple (b) or otherwise, at the will of the lord, accord-

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ference to the copyholds they are incorrect.

(a) No land can be granted by copy of court roll which has not been *demisable* by copy of court roll from the commencement of legal memory, which, though formerly altered from time to time, has long remained fixed at the coronation of Rich. 1, (6 July, 1189). If, therefore, it can be shewn that at any time within that period the power of *demising* has been suspended by the intervention of an estate for life or for years, all subsequent copyhold grants are void. But it is not necessary that the land should have been actually *demised* by copy of court roll. Lands which have always remained in the hands of the lord, or in the hands of his tenants at will, whether by free tenure, at the will of both parties, or by villein tenure, at the will of the lord only, may still retain their customary *demisibility*, or may still be *demisable* by copy of court roll. The term "always demised and demisable by copy of court roll" does not appear to be strictly correct. For though the tenant is said to hold by *copy* of court roll, because the copy is the evidence which he possesses of his estate, yet the demise is by the

roll itself, and is antecedent to the copy. Nor does the granting of the copy seem to have been coeval with the practice of entering the admittance upon the rolls. The tenants were called "tenants by the rolls of the manor" before they acquired the name of tenants by *copy* of court roll. M. 42 E. 3, fo. 25, pl. 2.

(b) Though in point of tenure a copyhold is an estate in villeinage, being held at the will of the lord, and not at the will of the tenant also, yet, if the custom warrant such an extension, it may in point of duration of *interest* be held in fee simple. The Cornish villein tenures in *nativâ conventionis, de septem annis in septem annos*, appear also to have been susceptible of an extension, in point of duration of *interest*, to a fee simple. These estates, though, like copyholds, not inconsistent with the personal freedom of the tenant, have long since disappeared. The higher species of conventional tenure, in *liberâ conventionis, de septem annis in septem annos*, which still subsists, is likewise capable of acquiring a customary duration in fee simple. In copyholds, however, the extension of the original *interest* in point of duration is noticed in the instrument of

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ing to the custom of the manor (*a*), and in which manor, during all the time aforesaid, the lord of the manor or his steward of the manor for the time being, once or oftener in each year, have held, and still of right ought to hold, customary courts of the manor, and have at such courts admitted and ought to admit such persons as have been and are entitled to be admitted as tenants of the customary tenements, and to such interests as they have required and may require, according to the custom of the manor; that *Henry Flitcroft* was in or about the year 1769 duly admitted to certain copyhold tenements parcel of the manor, consisting (among other things) of a house and 46 acres of land at West End, in the said manor, and a house at Froggnall, in the said manor, to hold the same to him and his heirs at the will of the lord, according to the custom of the manor; and that *Flitcroft*, on or about 3d April, 1826, died so seised of the said copyhold tenements, and that *Walmsley* is the heir at law, according to the custom of the manor, of *Flitcroft*; that at a general customary (*b*) court holden

grant to which the lord is party; whereas in the Cornish assessable manors, though the customary tenant surrenders to the purchaser in fee, *according to the custom of the manor*, the surrenderee is admitted, by the duke's commissioners upon the assession roll, merely to the original estate from seven years to seven years *according to the custom of the manor*, which words seem, in the former place, to point to the septennial *tenure*, and in the latter, to the customary permanence of the *interest*.

(*a*) Where the custom warrants a grant in fee simple, the

lord may create any less estate. 4 Co. Rep. 23 a.; Co. Litt. 52 b.; 1 Roll. Abr. 511, l. 30.

(*b*) The proceedings in this case would take place, not in the Court Baron, which is the Court of the freeholders only, and in which the suitors are judges, but in the Customary Court, at which the copyholders are bound to attend, but in which the steward of the manor is the judge. For the sake of convenience both Courts are generally held at the same time, as is also the Court Leet, where the lord possesses that franchise: but though these three Courts, or any two of them,



for the manor, on or about the 8th day of January, 1829, application was made to the steward, by and on behalf of *Walmsley*, to admit him, *Walmsley*, so being heir at law, according to the custom of the manor, of *Flitcroft*, to the said copyhold tenements, as tenant thereof in possession, and that frequent application had since been made by *Walmsley* to admit him to the same copyhold tenements as the right heir and heir at law of *Flitcroft*, according to the custom of the manor; that the steward had refused to admit *Walmsley* as tenant in possession of the said copyhold premises by reason or pretence of a certain alleged surrender made by *Flitcroft* in his lifetime to the use of his will, and of certain life and other estates alleged to have been devised in and by the will of *Flitcroft* after the time of the said surrender; and that on the 28th day of May, in the year 1829, at a certain customary court then held in and for the manor, *Walmsley* had attended the said court, and had again requested the said steward to admit him, *Walmsley*, to the said copyhold tenements as tenant in possession, and produced and tendered to the steward a certain disclaimer duly made and executed by *James Fletcher* and *Anna Maria Fletcher*, the only surviving devisees under the said will, whereby they the said *James Fletcher* and *Anna Maria Fletcher* disclaimed, renounced, and relinquished all right and title whatsoever, of, in, or to the said copyhold tenements; yet the defendants well knowing the premises, but not regarding their duty in that behalf, had absolutely refused, and still did refuse, to admit *Walmsley* to the said copyhold tenements as tenant in possession thereof, according to the custom of the manor.

may, by usage, be held at the same time and place, and the proceedings entered in the same

book, they are perfectly distinct and independent.

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To this writ the defendants returned, that at a Court Baron held for the manor, 8 May, 1769, *Flitcroft* had been duly admitted as tenant to the copyhold tenements holden of the lord of the manor (*a*) and parcel of the manor, to hold the same to him and his heirs at the will of the lord of the manor, according to the custom of the manor, as in the said writ is mentioned; and that *Flitcroft* did at such Court, after his admission to the copyhold tenements as aforesaid, duly surrender the same into the hands of the lord of the manor, by the rod, by the hands and acceptance of the steward of the manor, according to the custom of the manor, to and for such uses, intents,

(*a*) Copyholds being part of the demesnes are *parcel* of the manor, and not *held* of the manor. The tenemental lands, or lands held by the freeholders of the manor, are not, strictly speaking, *parcel* of the manor, yet as the services of these freeholders are parcel of the manor, and as the lands themselves must have been once part of the demesnes, and are still within the seignior, such tenemental lands were said (by *Shard*, J.) to be quasi parcel (par maner parcel) of the manor. Fitz. Abr. 12 Ass. 18, Auncien Demesne, pl. 33, which is a more full report than is to be found in the Year Book, 12 Ass. fol. 35, pl. 18, where this dictum is not mentioned.

Much confusion often arises in the use of the terms "within the manor," "within the fee and seignior of the manor," and "within the ambit of the manor." The first of these terms applies

to land in the possession of the lord, or of his leaseholders or copyholders. The second, to lands which, being formerly within the manor, were, before the statute of *Quia Emptores* or *De Prærogativâ Regis*, granted by the lord to be held *of the grantor* in fee *as of his manor*. The term "within the ambit of the manor," is applicable to land which, being surrounded by the manor, is neither parcel of the manor nor held of the manor. It may apply to land which never was connected with the manor in point of tenure, or which, having been formerly within the manor, has been alienated from it in fee, either by a direct conveyance, *tenendum* of the chief lord of the fee, before or since the statutes, or by a subinfeoffment before the statutes, since followed by an alienation of the seignior to a stranger, or by a release of the seignior to the tenant.

and purposes as he, *Flitcroft*, should, in and by his last will and testament in writing, thereof direct, declare, limit, or appoint; that on the 3d day of April, 1826, *Flitcroft* died so seised of the copyhold tenements as aforesaid, having first duly made and published his last will and testament in writing, duly executed for devising copyhold estate, whereby he devised the copyhold tenements to his mother for life, with remainder, after her decease, to the use of *James Fletcher* for life; and from and after the determination of that estate, to the use of trustees in trust to support and preserve, &c.; and from and after his decease to his first and other sons in tail male, with remainder to all and every the daughter and daughters of *J. Fletcher* in tail general; and on failure of issue of *J. Fletcher*, to the use of *Anna M. Fletcher* for life, with like limitations to her issue; and in default thereof to the use of *M. Fletcher* for life, with like limitations to her issue, and the ultimate remainder to the right heirs of *Flitcroft*; that *Lyddon* did, on the 15th day of June, 1827, make search at the Register Office for the county of Middlesex, and on such search did find an entry in such register of the memorial of an indenture of release, bearing date the 24th day of August, 1826, made between *J. Fletcher* of the first part, *A. M. Fletcher* of the second part, and *Walmsley* of the third part; by which release *J. Fletcher* and *A. M. Fletcher*, for the considerations therein expressed, did demise, release, and for ever quit claim unto *Walmsley*, all the copyhold messuages or tenements, lands and other hereditaments, situate and being within and held of the said manor of Hampstead, of or to which *Flitcroft* was seised or entitled at the time of making his thereinbefore recited will, and also at his death, with the appurtenances and all the estate, &c.: to hold the said copyhold messuages, &c., thereby released, and every part thereof, to

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*Walmsley*, his heirs and assigns, for and during all the rights and interests by or under the said will of *Flitcroft* devised to or otherwise vested in *J. Fletcher* or *A. M. Fletcher*, or either of them; to the end and intent the same rights and interests might severally merge and be extinguished in the estate which had descended upon *Walmsley* as customary heir of *Flitcroft*; that *Lyddon* also found on such search another entry in such register of the memorial of another indenture bearing date 25 August, 1826, and made between *Walmsley* of the first part, *A. M. Fletcher* of the second part, and *J. Fletcher* of the third part; by which indenture, in consideration of a covenant entered into by *J. Fletcher* and *A. M. Fletcher* to surrender all their estate and interest in certain copyhold estates of *Flitcroft*, and also in consideration of 2,500*l.* to *Walmsley* paid by *J. Fletcher*, the said *Walmsley*, with the consent and approbation, and at the request of *A. M. Fletcher*, did grant, bargain, sell, alien and confirm, unto *J. Fletcher* and his heirs, all that the remainder or reversion in fee simple, to take effect in possession upon the several deceases of *J. Fletcher* and *A. M. Fletcher*, and failure of the issue of the respective bodies of *J. Fletcher* and *A. M. Fletcher* of and in the therein described lands, tithes and hereditaments in Hendon, and all other the manors, rectories, advowsons, messuages or tenements, lands, tithes, hereditaments and premises whatsoever of *Flitcroft* in Hendon, habendum unto the use of *J. Fletcher* and his heirs; that the said copyhold tenements mentioned in the said indenture of the 24th of August, 1826, and the said copyhold tenements mentioned in the said indenture of the 25th of August, 1826, are the same copyhold tenements, and not other or different, and that they comprise the said copyhold tenements devised by the will of *Flitcroft*; that

the supposed disclaimer by the said *J. Fletcher* and *A. M. Fletcher* bears date the 4th of May, 1827, and subsequently to the indentures of 24th and 25th of August, 1826, and is colourable only, and was made for the purpose of depriving and defrauding the lord of the said manor of the fines which would have been payable to him on the admissions of *J. Fletcher* and *A. M. Fletcher* respectively to their said life estates in the said copyholds, according to the custom of the manor; that at a general court baron held for the manor on the 8th of January, 1827, *Walmsley* was admitted, as the heir of *Flitcroft*, to the immediate tenancy in possession of the copyhold estate in the manor, late of *Flitcroft*, not surrendered to the use of his will, and that *Walmsley* was so admitted by *Lyddon*, the steward of the said manor, from his erroneous belief that the said copyhold estate did not pass by the devise in the said will, because it had not been surrendered to the use of *Flitcroft's* will, and therefore descended to *Walmsley* as heir, and that *Walmsley* was admitted to the same estate upon no other ground than that the same had so descended to him; that within the manor there now is, and from time whereof &c. hath been, a certain ancient and laudable custom there used and approved of, that is to say, that when a customary tenant has surrendered a customary tenement of the manor to the use of his will, and has afterwards devised the same to any person or persons for life or in tail, with remainder to any other person or persons for life or in tail, or in fee, such devisee or devisees has or have been admitted by the lord of the manor to the same for or according to the estate or interest, or respective estates or interests of such devisee or devisees therein. And these are the causes, &c.

*Long*, for the prosecutor of the mandamus. Upon

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this writ and return five points are raised for the consideration of the Court. First, on the death of *Flitcroft* the estate descended to his heir. Secondly, on the neglect of the devisees to come to be admitted, and more especially after their disclaimer, the heir had a right to be admitted. Thirdly, the deeds of 24th and 25th of August, 1826, did not take away the right of the heir to be admitted. Fourthly, the amount of the fines payable to the lord in respect of the admission of *Walmsley*, cannot be gone into upon a return to a mandamus. Fifthly, the custom stated in the return does not vary the right of the heir. On all these grounds *Walmsley* is entitled to a peremptory mandamus. On the death of *Flitcroft*, the estate of which he died seised vested in his heir, *Roe d. Jeffereys v. Hicks (a)*. In that case *Joseph Jeffereys* surrendered to the use of his will, and devised to his niece *Elizabeth*, who was attainted and executed for the murder of her uncle, and it was held that the estate descended upon the heir of the uncle, and that the niece, who was not the heir, had nothing to forfeit to the lord. In the case of a surrender to the use of a will, the estate remains in the surrenderor and his heir until the admittance of the devisee, *Smith v. Triggs (b)*. A surrenderee cannot devise before admittance. The cases which shew that where there is an intermediate life estate, the estate does not descend, are not disputed. Here, in whom would the estate be, if it did not descend? In no case can there be any thing like an abeyance of the copyhold. As soon as one person ceases to hold, another becomes tenant. The estate descends, but liable to be devested upon the admittance of the surrenderee. Secondly, if the devisee do not chuse to take the tenancy upon

(a) 2 Wils. 13; 1 Ken. 110.

(b) 1 Stra. 487.

himself, either the lord has a right to compel the heir to be admitted, or the heir has a right to assume the tenancy. Here there is a distinct disclaimer. In *Townson v. Tickell* (a), a disclaimer by deed, by the devisee of a freehold estate, was held to be sufficient to divest the estate. The present case is stronger, because in a copyhold the estate does not vest in the devisee by the will, which only operates as a designation of the person entitled to be admitted under the surrender. In *Townson v. Tickell*, Lord Tenterden says, "the law is certainly not so absurd as to force a man to take an estate against his will." Holroyd, J. says, "that even a parol disclaimer would be sufficient," relying upon *Bonifaut v. Greenfield* (b). This will apply with still greater force to the case of copyholds. In the case of the devise of a freehold, the devisee becomes seised upon the death of the devisor, by force of the Statute of Wills. A plausible argument is raised in *Townson v. Tickell* in favour of the necessity of a disclaimer in a Court of record, but that objection was overruled. In *Wainwright v. Elwell* (c) it was held by Plumer, V.C. that the devisee of a copyhold surrendered to the use of the will of the surrenderor

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(a) 3 B. & A. 31, overruling *Butler and Baker's* case, 3 Co. Rep. 25, upon the supposed authority of *Bonifaut v. Greenfield*, Cro. El. 80, which turned upon the wording of a particular act of parliament, and of *Thomson v. Leach*, 2 Ventr. 196, the judgment in which case, in accordance with that given in *Townson v. Tickell*, was reversed in the House of Lords. For a full account of the proceedings in *Townson v. Tickell*, and the peculiar circumstances attending

that case, *vide* 4 M. & R. 189, (a). And see Litt. Sect. 685; Co. Litt. 360, n.; *Doe v. Smyth*, 9 D. & R. 136; 6 B. & C. 112.

(b) Which merely decided what should amount to a refusal of the office of executor, and what should (not divest an estate, but) prevent an estate from vesting, which was made dependent upon the acceptance of such executorship. See this case stated and examined, 4 M. & R. 190, n.

(c) 1 Madd. 627.

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could not devise. [*Bayley, J.* A surrenderee cannot surrender before admittance, *Doe d. Tofield v. Tofield*(a).] Thirdly, the deeds of 24th and 25th of August, 1826, do not take away the right of the heir to be admitted. An equitable interest is assignable, and it would be strange if the interest of the devisee of a copyhold could not be got rid of. The second deed states a transaction which is partly in the nature of a sale and partly in the nature of an exchange. The lord has nothing to do with either of these deeds, and cannot take advantage of the arrangements effected by them, whatever question they may give rise to between the heir and the devisees in a Court of equity. The heir has given a valuable consideration for the release of the surrenderees. Fourthly, no question as to the amount of fine can arise until after admittance (b). [This was conceded on the other side.] Fifthly, the customs set out pervade all copyhold manors. [*Comyn.* It is not admitted that the lord cannot compel the devisee of the surrenderor to come in and be admitted tenant. *Bayley, J.* The custom stated is in effect, that the lord may compel the devisee to come in, and may seize *quousque*.] If the devisee be not compellable to come in, the heir must come in, as the lord must not lose his tenant. These rights are reciprocal.

*Comyn, contra.* It is the right and the duty of the lord to see that he has a proper and legal tenant admitted to the copyhold. All will resolve itself into a question whether the heir has a right to be admitted tenant *in possession*. It is submitted that he has no such right, because the estate has not descended to him though heir, and he is only entitled upon failure of all the inter-

(a) 11 East, 246.

(b) *S. P. Bacon v. Flatman*,  
 cited 4 Co. Rep. 28, a.



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mediate estates. He is heir at law in remainder. The lord is bound to see that a proper person is admitted tenant. [*Bayley, J.* What authority is there for that proposition?] It requires none. [*Lord Tenterden, C. J.* The question is the same as if the surrenderor had devised away in fee.] Until the death of the appointees, the heir has no estate. The heir can have no estate until the life estate is extinct and upon failure of issue in tail. [*Bayley, J.* He does not claim under the remainder, but as heir of the person last seised, no other person appearing to claim to be admitted.] The lord knowing that another person is entitled, is bound to hold the estate for the party entitled. It is merely colourable and fraudulent in *Walmsley* to claim as heir, when he has a secret deed from the persons interested under the devise. The cases cited to shew that a party is not bound to take an estate against his will, do not apply. There is no doubt but that such party may disclaim, but it is denied that the devisee has a right to claim an interest, and to convey that interest clandestinely to the heir, for the purpose of getting rid of the liability of the devisee to be admitted. [*Bayley, J.* What right has the lord but to have a tenant? The estate remains in the surrenderor and his heirs until the surrenderee comes in to be admitted. If the surrenderee surrender before admittance, he conveys no estate of which a Court of law can take cognizance. So if such surrenderee devise before admittance.] The writ does not state that the claimant is heir at law of the estate. [*Bayley, J.* It alleges that *Flitcroft* died seised, and that *Walmsley* is heir according to the custom, upon which *the law* says that he is heir of the estate.] He is not heir at law of this estate, but he is entitled under the intermediate devise. [*Parke, J.* The estate must be taken to descend, until the contrary be shewn.] The mere neglect of the tenants for life to

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come in does not affect the rights of these parties. The Court will not say that the lord *shall* have a tenant, although he has no right to refuse to admit the proper tenant.

*Long*, in reply, was stopped by the Court.

LORD TENTERDEN, C.J.—By the common law the estate is in the surrenderor and his heirs until the surrenderee comes in to be admitted. Here the estate descended subject to the right of the appointees to come in and claim admittance. When they declare that they will not come in, that obstacle is removed. If the effect of the deeds were to shew that the devisees were taking a benefit under the will, and that a loss accrued to the lord by the arrangements made between these parties, the lord must proceed in another way. We have only to see whether the heir has a right to be admitted.

BAYLEY, J.—The Court is bound to look to the legal title. The lord has a right to have a person in whom the legal estate is, admitted on the roll, and that person has a right to be admitted. The estate is in the surrenderor and in his heirs until the devisee, who is the surrenderee designated by the will, comes in. Until he comes in, the estate is in the heir, who now claims to be admitted, not in respect of his reversion, but in respect of his immediate estate. *Flitcroft* died seised, therefore the estate descended. The heir may bring trespass; which shews that the estate descends upon him. Except as against the lord, the heir would have the whole estate in him. The admittance is for the benefit of the lord. The lord cannot seize or make proclamations, except for the purpose of placing himself in a situation to do what the mandamus requires, and it is only when he has

so done that he will be entitled to the fines. My only doubt was, whether the heir could obtain a mandamus, because the right of possession was in him before. But that doubt is removed by the case of *Rex v. The Brewers' Company* (a).

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LITLEDAL, J.—I am of the same opinion. It is not necessary to consider what fines the lord is entitled to receive. If this is, as has been insinuated, a scheme and contrivance to do that which the law does not sanction in defeating the claim of the lord to new or greater fines, the lord must have his remedy either by action or by bill in equity. Here the legal estate is to be considered as if it were a case of ejectment. It is the same thing whether the surrenderor makes a will or not; and it is clear that if the surrenderor die without making a will, the estate descends to the heir. If the life estates created by the will be disclaimed, it is the same thing as if they had never been limited. In some manors the custom requires that the presentment be made at the next Court; in others, that it be presented within the year. The situation of the parties is the same as if the appointees had not chosen to come to the next Court, or at the Court at which they were entitled to be admitted, except that the disclaimer makes the case still stronger. The effect of the disclaimer is to place the parties in the same situation as if no devise had been made.

PARKE, J.—I am of the same opinion. The question lies in the narrowest possible compass. Not a single authority has been cited to impugn the grounds upon which this writ was obtained. Upon the death of the surrenderor the estate descended to the heir, who has a right to a mandamus to admit him, he taking his chance

(a) 4 D. & R. 492; 3 B. & C. 172.

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whether the devisee will apply to be admitted. Any difficulty is, however, removed by the disclaimer of the devisees; though I think that without a disclaimer the heir would have been entitled to be admitted. If a fraud has been practised upon the lord, he has his remedy in another shape (*a*).

(*a*) A manor is commonly said by the text writers to consist of demesnes and services. This is rather a statement of some of the incidents of a manor, than a strict legal definition. On the other hand, persons who are not lawyers frequently comprehend under the term manor, circumstances which have no necessary connection with this species of estate. Thus the right to wastes within the district over which the manor extends, is frequently called a manerial right; though the right of the lord to such wastes, where there has been no actual possession, rests merely upon the presumption that they belong to the lord as the present owner of the demesnes, and as the ancient owner of the teneemental lands, by which these wastes are surrounded. The same presumption would arise in favour of any other owner of an extensive district enclosing wastes. So, the seignior of copyholds is frequently an incident to a manor; but there are many manors in which this species of tenure does not appear to have ever existed, and still more in which it has been long extinct; and though no copyholds unconnected with a manor exist at the

present day, the custom of demising by the lord's rolls appears to have formerly been common to every lord who had demesnes which were held in villenage. So, the right to have a Court-Leet is a royal franchise, under which the grantee holds a court of criminal jurisdiction in the king's name, over the residents (residents) within a particular district. This privilege may be granted to persons who are not lords of manors; and where the grantee has a manor, the limits of the manor and of the leet are not necessarily co-extensive. So, except in the case where a grant of free warren or free chase is annexed to a manor, the lord has no other privilege in respect of *game*, than the power given by modern statutes of appointing a gamekeeper. With this, however, is frequently confounded the advantage derived from the presumption of ownership over extensive wastes, which has already been shewn to have no necessary connection with *manerial* rights. A correct legal definition of a manor, the terms of which nothing can be added to or taken from, it would be difficult, if not impossible, to find in our text writers. An attempt

to supply this apparent omission may not be considered to be misplaced. *A manor consists of demesnes and an appendant mesne seignior over freeholders, qualified, in respect of quantity of estate, and sufficient, in point of numbers, to constitute a Court-Baron.*

Formerly there could be no manor without a mansion-house (manerium, manoir) at which the services were due and might be tendered and from which this peculiar species of estate derived its appellation (Maseres, *Historiæ Anglicanæ Selecta Monumenta*, 256, n.) At the present day the demesnes may, and very frequently do, consist entirely of land; and there may be a good legal manor, although the mansion-house, or the spot on which it stood, (usually described as the scite (site) of the manor,) have been aliened from the manor; (and see *Winter v. Loveday*, 5 Mod. 382; Owen, S1; 4 Inst. 268;) or it cannot be now shewn that any mansion ever existed on the land; though it would seem that no estate could ever have acquired the name of a manor without possessing a mansion-house on the demesnes. Before the statute of *Quia emptores terrarum*, 18 *Edw. I.* cap. 1 & 2, when seigniories might be created at pleasure by unlimited sub-infeudations, the existence or the non-existence of a *seignior* at any particular period would be an immaterial circumstance in comparison with the lord's *mansion*, by services to be per-

formed or tendered, at which the subtenure was distinguished. And see *Plowd.* 169; *Fulb. Par.* 18 a, b; Maseres, *Hist. Angl. Sel. Monumenta*, 255 n.; Appendix to 3d Report of the Common Law Commissioners, B. 20.

The demesnes are an integral and necessary part of the manor; for if the lord alien all the demesnes, his remaining estate will not be a manor, but a seignior in gross, a species of estate very common in the earlier periods of our legal history, but now practically almost unknown in England, though still subsisting, in a somewhat similar form, under the name of superiorities, in Scotland (a).

The demesnes are those lands of which the lord is seised, whether they are in his own occupation, or in that of his tenants at will, or for years. Of these the former have either a customary estate, as holding at the will of the lord, according to the custom of the manor, or they have a common law estate, holding at the will of both lessor and lessee. The tenancy for years is, in modern times, usually a common law estate, though in the assessable manors, parcel of the duchy of Cornwall, customary estates for years are still subsisting. (*Rowe v. Brenton*, 3 M. & R. 133, 143 b., 243, 310, 311, 313, 314, 315, 316, 318, 326, 357, 358, 362, 363; Mann. Excheq. Pract. 2d edit. 357, n.) If the lord of a manor were to make a

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(a) The French *fiefs en l'air*.

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gift in tail or a lease for life, of all the demesnes, there would, during the continuance of the particular estate, be no demesnes within the manor. The services of the freeholders of the Court Baron would not be appendant to the demesnes, but to the reversion of these demesnes expectant upon the determination of the particular estate. During the continuance of this state of things it would seem that the lord would have, not a manor, but a double seigniority in gross, one in respect of the donees in tail or lessees for life, the other in respect of the ancient freehold tenants of the manor. And see *Hartop v. Tuck*, Hetl. 14; *Bracebridge v. Cote*, Plowd. 422, b.

To constitute a manor there must not only be demesnes, but also, appendant thereto, a seigniority over freeholders. And this must be a *membrum* seigniority (a); since no freeholder, holding in capite, can, in respect of the same freehold, hold of a manor; and, *converso*, the king cannot, *jure corona*, be lord of a manor (b). These freeholders, we have seen, constitute the curia baronum, the word baron having been formerly synonymous with freeholder (c). In order to determine that a particular district constitutes a manor, it must be

ascertained that a person seised of land within that district is also seised of the services of two or more other freeholders of inheritance within the same district, and that the seisin of the land and the seisin of the services of the freeholders have, *for any thing that can be shewn to the contrary*, been united ever since the statute *De Prærogativâ Regis*, if the land be holden immediately of the crown, or since the statute of *Quia emptores*, if the land be holden of a subject.

In honors, or very extensive manors, a distinction appears to have been drawn between the greater and the lesser barons, the former only being acknowledged as the pares curiæ. The Isle of Wight was granted by King Stephen to W. de Redvers, and was surrendered by his descendant, Isabella de Fortibus, to King Edward I. in 1293. During the 150 years that this honor was in the hands of a subject, the freeholders holding immediately under the lord of the island, owed suit and service at the lord's court. Those tenants however only were summoned who held to the extent of a knight's fee (d). Hence the Court was not simply Curia Baronum, but Curia Militum; and it still exists (e) by the name of the *Knighten Court*; the suitors being those who hold of the king,

(a) 2 Inst. 501.

(b) *Estwick's case*, 12 Co. Rep. 136.

(c) In Germany barons by tenure, and in later times, some of the titular barons, are called *free lords*, *freylherren*.

(d) Knight's fees were usually either manors or seigniories in gross, T. 16 E. 3, *Inner Temple, MS.*; M. 17 E. 3, fo. 8, pl. 10.

(e) Now held within the borough of Newport, but for the whole island.

as of his castle of Carisbrook, (the *manerium* of the island) to the value of 20*l.* per annum (*a*). It does not appear that the machinery of these Courts has proceeded so far as to allow of the lesser barons appearing by a select portion of their number, as in the Great Court-Baron of the realm.

So much importance attached to the possession of a mansion-house, at which the services of tenants might be rendered, that a villein who had a mansion upon his villenage, might grant portions of his villenage to be holden of him as of his *manerium*. The estate of the grantor, consisting of this mansion-house and the ungranted portions of the villenage, in *demesne*, and of the *services* of the granted portions of the villenage, was called a *customary* manor (*b*). See Sir Henry Nevill's case, 11 Co. Rep. 17; *Moore v. Goodgame*, Cro. Jac. 327; *Rex v. Stanton*, ib. 259; *Rex v. Stafferton*, 1 Bulstr. 54.

It has been said (*Morris v. Smith*, Cro. El. 38, arg.; Shower, 142, arg.) that the king cannot, at this day, create a manor. And this is perfectly true; because the king never could create a manor.

(*a*) From the documents produced at the trial of the case of *Mayor, &c. of Newport v. Saunders*, Winchester Spring Assizes, 1832, cor. Park, J. And see Sir R. Worsley's History of the Isle of Wight.

(*b*) Another species of customary manor might, and may still, be created by a grant or a demise to a stranger of the seignior of all the copyholds, or of all the copyholds within a certain district. 4 Co. Rep. 26, 7.

If before the statute *De Prærogativa Regis* the king had granted land to *A.*, the grantee might have sub-infeoffed *B.*, *C.*, *D.*, *E.*, and *F.* of parcels of the land, retaining the rest in his own hands, or in the hands of his tenants for years or at will. *A.* would then have had a manor; but this manor could not be said to be created by the crown, as the king could not create the sub-tenure, by which the manor was constituted. So, since the statute *De Prærogativa Regis*, if the crown grant land to *A.*, and either at the time of the grant or subsequently, license *A.* to sub-infeoff *B.*, *C.*, *D.*, *E.* and *F.*, of parcel of the crown grant, the effect would be the same as before the statute, that statute making no other alteration in the law than imposing the necessity of obtaining a licence for sub-infeudation. Even in land which not being held immediately of the crown, falls within the provisions of the statute of *Quia Emptores*, there appears to be no other obstacle to the creation of a new manor than the necessity of obtaining the licence as well of the crown as of all intervening lords. Thus Lord Coke says, (2 Inst. 501,) "these general words *ita tamen quod feoffatus teneat terram illam seu tenementum illud de capitali domino feodi illius* have a tacit exception, viz. unless all the lords, mediate and immediate, do assent thereunto, for *quilibet renunciare potest beneficio juris pro se introducto*." (And see Co. Litt. 99, d.) The language of the stat. *De Prærogativa Regis* is, "*nullus*

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*qui teneat de Rege in capite per servicium militare poterit alienare majorem partem terrarum suarum, ita quod residuum non sufficiat ad faciendum inde servicium, SINE LICENTIA REGIS.*" In the printed statutes the following words are added, which evidently form no part of the act. "*Sed hoc non consuevit intelligi de membris et particulis terrarum earundem.*" It seems also to be questionable whether, as the language of the statute De Prærogativâ Regis is "*qui tenet de Rege in capite per servicium militare,*" its provisions are not become inoperative by the abolition of military tenures. If so, then, inasmuch as the statute of Quia Emptores does not extend to lands holden in capite, but speaks of the "*emptores terrarum et tenementorum de feodis MAGNATUM et aliorum dominorum, in præjudicium eorundem,*" (a) it will follow that a freeholder holding in capite may at this day, without licence, make a sub-infeoffment or grant land in fee simple to be holden of himself, as he undoubtedly may do *with* the licence of the crown, under the express provisions of the statute De Præroga-

tivâ Regis, if the land be holden in capite, or with the licence of the lords mediate and immediate, under the implied, or, as Lord Coke calls it, the *tacit* exception in the statute of Quia Emptores, where the lands are holden of a subject. *Holmes v. Hanks*, 12 Mod. 494. The position of Mr. Baron Maseres (Hist. Angl. Sel. Mon. 256, n.) and of others (*Morris v. Smith*, Cro. El. 38, 39; *Marsh v. Smith*, 1 Leon. 26) that "it has been impossible to create a new manor ever since 1290," appears, therefore, to be expressed too generally. It is said indeed in an original case in Brooke, (Bro. Abr. *Compris*, pl. 31,) to have been held in 33 H. 8, that a man cannot create a manor by granting estates tail to hold by service of suit of court, *because a court cannot be but by continuance cujus contrarium, &c.*; but a Court-Baron appears to be incident to tenure at common law, requiring neither grant nor prescription to uphold it. *Rex v. Stafferton*, 1 Bulst. 54; S.C. per nomen *Rex v. Stanton*, Cro. Jac. 260; *Brown v. Goldsmith*, F. Moore, 870; *Pell v. Sowers*, Noy, 20; Co. Litt. 58, a.; 2 Inst. 43; Maseres, Hist. Angl. Sel. Mon. 256, n.

(a) And see 1 Tho. Co. Litt. 527, n. (I.); 2 Tho. Co. Litt. 211, n. (A.)



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- limited authority to have the legal custody of the rate. *Edwards v. Bennett*, H. 9 & 10 G. 4. Page 189
2. A declaration for penalties under the statute 17 Geo. 2, c. 3, alleged that the defendant was an assistant overseer, that a rate was duly made &c., and that the plaintiff, an inhabitant, &c., at a reasonable time, demanded an inspection of the rate, and tendered 1s.; and that, although the defendant, as such assistant overseer, had the rate in his possession, he refused to produce it; whereby, &c.;—*Held*, after verdict, that it was sufficient, because the allegation, that the defendant was an assistant overseer, could only be proved by the production of his appointment, in which his duties must be specified; and unless it had appeared, from the appointment, that he had a general authority to take care of the poor, or a limited authority to have the legal custody of the rate, the judge would have directed the jury to find a verdict for the defendant. *Id.* *Ibid.*

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## CANALS.

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By the Oxford Canal act, the proprietors were authorised to take a mileage tonnage for coals and other goods, excepting coals for two miles, in respect of which the proprietors of the Coventry Canal were authorised to take all dues payable under that act for all coals carried from the Oxford Canal

within those two miles. By the same act the proprietors of the Oxford Canal were authorised to take all dues payable under the Coventry Canal act, for all goods, except coals, carried upon the Oxford Canal, and afterwards upon the Coventry Canal, within three miles and a half of the point of junction of the two canals. That point of junction was in parish F., which contained one mile nine hundred and sixty-three yards of the Oxford Canal, part of the two miles before mentioned, and two miles and a quarter of the Coventry Canal, part of the three miles and a half before mentioned. By the Grand Junction Canal act, reciting that that canal might be injurious to the proprietors of the Oxford Canal, and that compensation should be made to them for such injury, they were authorised to take 2s. 9d. per ton for all coals passing from the Oxford Canal into the Grand Junction Canal, without regard to the distance they might pass on the Oxford Canal; and 4s. 4d. per ton for all other goods passing from any canal into the Oxford Canal, and from thence into the Grand Junction Canal, or vice versa, without regard to the distance they might pass on the Oxford Canal:—*Held*, that the proprietors of the Oxford Canal were ratable in parish F. for all the dues received by them, in the proportion in which they were severally earned in that parish, but that, in fixing the rate, all the expenses incurred in maintaining the part of the canal situate in that parish must be first deducted from the total amount of dues received. *Rex v. Oxford Canal Company*, M. 10 G. 4.

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A warrant of commitment for re-examination for an unreasonable time, as for fourteen days, is *wholly* void; and *trespass* lies against the committing magistrate, though he acted without any indirect or improper motive. *Davis v. Capper*, M. 10 G. 4. Page 570

## CONFESSION.

*See COUNSEL.—EVIDENCE, 9, 10, 11, 13, 14, 15, 17.*

## CONSTABLE.

*See EVIDENCE, 11, 13, 14.—NOTICE OF ACTION, 5, 6.*

1. A constable is justified in apprehending a person charged on suspicion of felony, if he have reasonable or probable cause to believe that the party charged is the felon; and it having been left to the jury to say whether, on all the facts before them, they thought the constable had reasonable ground to suppose that the party charged was guilty of felony, and whether they would have acted as the constable did:—*Held*, that this direction was right in substance, and that the constable did not exercise an undue degree of coercion, though he apprehended the party, a female, at night, without any warrant, and conveyed her to prison previously to taking her before a magistrate. *Davis v. Russell*, H. 9 & 10 G. 4. 226

2. A police constable is not justified under 10 G. 4, c. 44, s. 7, in laying hold of, pushing along the high-

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way, and ordering to be off, a person found by him conversing in a crowd with another, merely because that other is known as a reputed thief. *Stocken v. Carter*, T. 10 G. 4. Page 498

## CONVICTION.

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## COPYHOLDER.

*See DESCENT.*

1. The lord of a manor is bound to admit the customary heir of a copyholder in fee, although there be a surrender to the use of a will, and a devise by the surrenderor, there being no claim of admittance on the part of the devisee. *Rex v. Wilson*, M. 10 G. 4. 617
2. So, although it appear (upon the return to a mandamus) that the non-claim of admittance on the part of the devisee is the result of a contrivance between him and the customary heir to deprive the lord of the fine which would be payable upon the admittance of the devisee. *Id.* Ibid.

## CORONER.

It is the duty of a coroner in a case of death occurring in a pugilistic encounter, to examine a surgeon as to the cause of the death. *Rex v. Quinch*, T. 10 G. 4. 519

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## COSTS.

*See COVENANT, 1.—JUSTICES, 5.*

Where an indictment for felony is removed by certiorari, and tried at nisi prius, neither the judge at

nisi prius nor this Court has authority to award costs to the prosecutor under 7 G. 4, c. 64, s. 22, whether the indictment be removed by the prosecutor or the prisoner. *Rex v. Exeter, Treasurer of the County of M.* 10 G. 4. Page 606

## COUNSEL.

In opening a case of felony, the counsel for the prosecution should not state particular expressions supposed to have been used by the prisoner, nor the precise words of a confession, but only the general effect of what the prisoner said. *Rex v. Swatkins*, T. 10 G. 4. 510

## COVENANT.

See MASTER AND SERVANT, 1.

1. A covenant by lessee with lessor, his heirs and assigns, to indemnify the overseers for the time being of the parish in which the demised premises are situate, from all costs and charges by reason of lessee's taking an apprentice or servant, who may thereby gain a settlement in, or become chargeable to the parish, is valid. *Walsh v. Fussell*, H. 9 & 10 G. 4. 280
2. Such a covenant is personal, and does not run with the land, and lessor's executor may maintain an action for a breach of it. *Id.* *Ibid.*

## CRIMINAL INFORMATION.

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## DEPOSITIONS.

See EVIDENCE, 4, 5, 15, 16.—JUSTICES, 1, 2.

## DESCENT.

1. In the case of a devise of copyhold surrendered to the use of the

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will, the estate descends upon the heir, subject to the contingency of being divested by the admittance of the devisee. *Rex v. Wilson*, M. 10 G. 4. Page 617

2. No disclaimer by the devisee, therefore, is necessary to vest the estate in the heir. *Id.* *Ibid.*
3. A copyhold may be disclaimed by parol, or by other matter in pays. *Id.* *Ibid.*

## DEVISE.

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## DEVISEE.

See COPYHOLDER.—DESCENT.

## DISCLAIMER.

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## DISPENSATION.

What shall be a dissolution of a contract of hiring and service, and what a dispensation merely, is a question of fact for the sessions. *Rex v. Roxley, Inhabitants of*. M. 10 G. 4. 554

## DISSOLUTION.

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## EMBEZZLEMENT.

The halves of country bank notes, sent in a letter, are goods and chattels; and the person who steals or embezzles them is indictable for the larceny or embezzlement. *Rex v. Mead*, T. 10 G. 4. 504

## EVIDENCE.

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vice, 1, 2, 5.—SETTLEMENT, by renting a tenement, 2.

1. Parol evidence as to the party to whom a demise is made is not admissible where the agreement for the demise was in writing. *Rex v. Ramdon, Inhabitants of, M. 9 G. 4.* Page 44
2. A defendant brought up for judgment after being convicted of publishing a libel, imputing indictable offences to the prosecutor, cannot be allowed, in mitigation of punishment, to read affidavits alleging the truth of the libel. *Rex v. Halpin, H. 9 & 10 G. 4.* 63
3. A baptism cannot be proved by a minute written at the time by the parish clerk, nor by an entry in the parish register, made at a subsequent period by a succeeding incumbent, founded upon such minute. *Doe v. Bray, H. 9 & 10 G. 4.* 66
4. It is to be presumed that what is stated on oath before a magistrate is taken down in writing; and parol evidence of such a statement is not receivable, unless it be first shewn that it was not so taken down. *Phillips v. Wimburn, H. 9 & 10 G. 4.* 295
5. A prisoner being under examination before a magistrate, on a charge of felony, a statement was made in his presence by the solicitor for the prosecution, which the witness called to prove it said, he believed had been taken down in writing:—*Held*, that parol evidence of the statement was not admissible on the trial of the prisoner. *Rex v. Hollingshead, H. 9 & 10 G. 4.* 299
6. Production of the affidavit filed at the Stamp Office, and of a newspaper corresponding with that therein mentioned, is sufficient proof of publication, in an action or indictment against the proprie-

- tor for a libel. *Mayne v. Fletcher, E. 10 G. 4.* Page 356
7. Relief given by one parish to a pauper residing in another, is *prima facie* evidence of his being settled in the relieving parish; but though the sessions may properly act upon such evidence, they are not bound to do so. *Rex v. Yarnell, Inhabitants of, T. 10 G. 4.* 394
8. An unsuccessful search for the appointment of overseers in 1802, made in the parish chest, and among the papers of *B.* deceased, who had acted as executor to *A.*, who had acted as overseer in that year, is sufficient *prima facie* evidence of the loss of the appointment, to let in parol evidence of its contents, without producing the probate of the will of *A.* or of *B.* *Rex v. Witherly, Inhabitants of, T. 10 G. 4.* 438
9. If an indictment against a receiver state the principal felony to have been committed by *A.*, whatever would have been evidence of the principal felony to convict *A.*, is receivable to prove this allegation on the trial of the receiver, but is not conclusive. Therefore, if *A.* confessed the principal felony, that confession is admissible on the trial of the receiver, to prove the commission of the principal felony. *Rex v. Blick, T. 10 G. 4.* 490
10. A girl was charged with administering poison, with intent to murder. The surgeon said to her, "You are under suspicion of this, and you had better tell all you know." After this she made a statement to the surgeon:—*Held*, that that statement was not admissible in evidence. *Rex v. Kingston, T. 10 G. 4.* 492
11. Any person's telling a prisoner that it will be better for him to confess, will exclude a confession made to that person, although that

person was not in any authority as prosecutor, constable, or the like. *Rex v. Dunn*, T. 10 G. 4.

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12. On an indictment for poaching, it was proposed to shew that, on the occasion in question, the prosecutor's gamekeeper lost his coat, which was found in the prisoner's house. There was an indictment against the prisoner for stealing the coat:—*Held*, that this evidence was inadmissible, unless the prosecutor consented to an acquittal on the indictment for the larceny. *Rex v. Westwood*, T. 10 G. 4. 509
13. A prisoner was in the custody of *A.*, a constable. *B.*, another constable, coming into the room, *A.* left it, and the prisoner immediately made a confession to *B.*:—*Held*, that if the prisoner was in custody as an accused party, *A.* must be called to prove that he had held out no inducement to the prisoner to confess, before the confession made to *B.* was receivable in evidence; but if the prisoner was not then in custody on any charge, but merely detained as an unwilling witness, it was not necessary to call *A.* *Rex v. Swatkins*, T. 10 G. 4. 510
14. If a prisoner makes a confession to a constable, who takes down what he says, and the prisoner signs it, this paper will be read by the officer of the Court. *Id.* *Ibid.*
15. A prisoner, when before the committing magistrate, was sworn by mistake, being supposed to be a witness. As soon as the mistake was discovered, the deposition which was begun was destroyed, and the prisoner cautioned. After this he made a statement:—*Held*, that such statement was receivable in evidence. *Rex v. Webb*, T. 10 G. 4. 516

16. If a prisoner is brought before a magistrate, his statement ought not to be taken till the evidence against him is gone through, and he should then be asked if he has any thing to say in answer to the charge. *Rex v. Fagg*, T. 10 G. 4. Page 517
17. The captain of a vessel said to one of his sailors, suspected of having stolen a watch, "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle; you are a damned villain, and the gallows is painted in your face":—*Held*, that a confession made by the sailor after this threat, was not receivable in evidence on his trial for the felony. *Rex v. Parratt*, T. 10 G. 4. 518

#### EXECUTOR.

See COVENANT, 2.—EVIDENCE, 8.

#### FELONY.

See COSTS.—EMBEZZLEMENT.—POST OFFICE, 3.

1. *Semble*, that stealing brass fixed to tomb-stones in a church-yard is a felony within 7 & 8 G. 4. c. 29, s. 44. *Rex v. Blick*, T. 10 G. 4. 490
2. If a person has a threshing-machine taken to pieces, he expecting a mob to come and destroy it, and the mob come and destroy the different parts of the machine when thus separated—This is a felony within 7 & 8 G. 4. c. 30, s. 4. *Rex v. Mackerel*, T. 10 G. 4. 495
3. *A.* had a threshing-machine worked by water, the water-wheel having been put up for the sole purpose of working this machine, and never having been used for any

thing else. *A.* fearing the destruction of the machine by a mob, took it down, leaving the water-wheel standing. The prisoners broke the water-wheel:—*Held*, a felony, under 7 & 8 G. 4. c. 30, s. 4; and the fact that *A.* sometimes worked the machine by horses will make no difference. *Rex v. Fidler*, T. 10 G. 4. Page 496

#### FORCIBLE ENTRY.

1. Upon the trial of an indictment for a forcible entry or detainer, under 8 H. 6, c. 9, or 21 J. 1, c. 15, the party dispossessed is not a competent witness for the prosecution. *Rex v. Williams*, E. 10 G. 4. 340
2. Nor is it competent to the defendant to impeach the title of the party dispossessed. *Id.* *Ibid.*
3. Where such an indictment is brought before K. B. by certiorari, that Court is bound, upon conviction, to award restitution. *Id.* *Ibid.*

#### FRIENDLY SOCIETIES.

1. By the rules of a friendly society, twelve persons were annually chosen as a committee, who were empowered to settle and determine all grievances, differences, and disputes which might arise relative to the affairs of the society, subject to an appeal to two magistrates, by a party grieved; and each member was to pay three shillings annually to the society's medical attendant. The plaintiff, who had been duly appointed such attendant, was dismissed by the committee, without any previous notice, and another person appointed in his stead, but against his consent, and without any meeting of the members at large. Disputes having arisen respecting the plaintiff's dismissal,

upon an application by the committee to two magistrates, they recommended a general meeting of the society; which was convened accordingly, and a large majority of the members voted for the plaintiff, who sued the stewards of the society for the allowance received from the members for his services subsequently to his dismissal. The jury found, that the committee did not act *bonâ fide* in dismissing the plaintiff:—*Held*, that, as such dismissal was not a grievance or dispute within the jurisdiction of the committee, the plaintiff was entitled to recover in an action for money had and received; and that the stewards were not bound to pay over the allowance received from the members to the person appointed in the plaintiff's stead, although the committee ordered them to do so. *Garner v. Shelley*, T. 10 G. 4. Page 452

2. The proceedings upon the complaint of a member of a friendly society under 49 G. 3, c. 125, s. 3, must be *all* before two justices resident in the county in which the society is held. *Sharp v. Aspinall*, M. 10 G. 4. 558

#### GAME.

See EVIDENCE, 12.—INDICTMENT, 11.  
An unqualified servant going out with his qualified master, and shooting game in his presence, and for his use, is liable to a penalty under 5 Ann, c. 14, for keeping and using a gun to kill game. *Ex parte Sylvester*, H. 9 & 10 G. 4. 59

#### HAWKERS AND PEDLARS.

1. The exemption in 50 G. 3, c. 41, s. 23, (the Hawkers' and Pedlars' act,) in favour of the real worker or maker of goods, &c., or his  
x x 2

children, apprentices, and known agents or servants usually residing with him, does not extend to an agent or servant residing in a separate dwelling-house, though solely employed by such worker or maker. *Rex v. Mainwaring*, M. 10 G. 4.

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2. Yeast is a *victual* within the exception in 50 G. 3, c. 41, the Hawkers' and Pedlars' act. *Rex v. Hodgkinson*, M. 10 G. 4. 603

### HIGHWAYS.

See TITHES, 1.—TURNPIKE ROADS.

1. An order for diverting and stopping up a highway, and substituting for it a new road, is bad, unless it appear that the public acquire as permanent a right in the latter as they had in the former. *Rex v. Winter*, M. 9 G. 4. 46
2. *Semble*, that this must appear on the face of the order. *Id. Ibid.*
3. *Semble*, that the order should shew a contract with the owner of the land over which the new road is to be made. *Id. Ibid.*
4. *Semble*, that upon the diversion of a highway, it cannot be continued for foot-passengers only. *Id. Ibid.*
5. An order for stopping up a road under the general turnpike act, 3 G. 4, c. 126, where the site of the old road is taken in exchange for that of the new, is valid, although no conveyance to the trustees be executed. *Allnutt v. Pott*, M. 9 G. 4. 53
6. By 3 G. 4, c. 126, s. 65, no trustee of a turnpike road shall enjoy any office or place of profit under any act of parliament in execution of which he shall have been appointed, or shall act; and if any such trustee shall, without having first resigned such office, hold any such office, he shall forfeit 100*l.* A trustee who holds the office of

### INDICTMENT.

treasurer, which may be made an office of profit, is within the penalty of the act, though he makes no profit of it in his own person. *Delane v. Hillcoat*, H. 9 & 10 G. 4. Page 171

### HUNDRED.

1. A tervor, and also the party seised of the freehold subject to the term, may each recover damages to the extent of 200*l.* against the hundred for the injury resulting from a felonious burning in respect of their possessory and reversionary interest. *Pellew v. East Wonford*, H. 9 & 10 G. 4. 127
2. Where the reversioner sues, no servant of his having had the care of the premises, he is the proper person to give in an examination. *Id. Ibid.*
3. The examinant is not bound to state mere suspicions entertained by him as to the person who committed the offence, unless interrogated thereto by the magistrate. *Id. Ibid.*
4. The two days allowed by 9 G. 1, c. 22, for giving notice of the offence, are exclusive of the day on which the fire happens. *Id. Ibid.*

### INDICTMENT.

See COSTS.—COUNSEL.—EVIDENCE, 6, 9, 10.—FORCIBLE ENTRY.

1. Indictment for stealing a *sheep*. Proof that the animal stolen was a lamb:—*Held*, a fatal variance. *Rex v. Birket*, H. 9 & 10 G. 4. 296
2. An indictment for arson, under 7 & 8 G. 4, c. 30, charging the offence to have been committed "feloniously, voluntarily, and maliciously," is bad. *Rex v. Reader*, H. 9 & 10 G. 4. 297
3. So, if it describe the property burned as *straw*, and it is proved to be *haulm*. *Id. Ibid.*



## INDICTMENT.

4. An indictment, at common law, for burning a barn, must describe the barn as containing corn. *Rex v. Reader*, *H.* 9 & 10 *G.* 4.  
Page 297
5. If a parish be partly situate in the county of *W.*, and partly in the county of *S.*, it is sufficient, in an indictment for *larceny*, to state the offence to have been committed "at the parish of *H.* in the county of *W.*" *Rex v. Perkins*, *T.* 10 *G.* 4.  
485
6. If a servant put poison into a coffee-pot which contains coffee, and when her mistress comes down to breakfast, the servant tells the mistress that she has put the coffee-pot there for her, (the mistress's breakfast,) and the mistress drinks the poisoned coffee; this is a "causing the poison to be taken" within 9 *G.* 4, c. 31, s. 11, and the servant is indictable under that statute. *Rex v. Harley*, *T.* 10 *G.* 4.  
486
7. *Seemle*, that this is also an "administering" within that act, as, to constitute an administering, it is not necessary that the poison should be delivered by the hand of the party. *Id.* *Ibid.*
8. An indictment on 7 & 8 *G.* 4, c. 30, s. 17, charged a party with setting fire to a "*stack of barley*, of the value of 100*l.* of *R. P. W.*:"—*Held*, good, although the words of the statute creating the offence are, "any stack of *corn or grain*:"—*Held*, also, that the words "*of R. P. W.*" sufficiently stated the property:—*Held*, also, that if the indictment state that the prisoner, "on &c., at &c., feloniously, unlawfully, and maliciously did set fire to a certain stack of barley of the value of 100*l.* of *R. P. W.* then and there being," this is sufficient, without stating that the prisoner, on &c., at &c., feloniously, unlawfully, and maliciously did *then and*

## JURISDICTION. 645

- there* set fire to the stack. *Rex v. Swatkins*, *T.* 10 *G.* 4. Page 510
9. Indictment for mixing sponge with milk, and administering it with intent to poison:—*Held*, insufficient, for not averring that the sponge was of a poisonous nature. *Rex v. Powles*, *T.* 10 *G.* 4. 519
10. In an indictment under 52 *G.* 3, c. 143, for stealing a letter, it was alleged that the letter was "to be delivered at *T.*" The letter was addressed "*T. House*," which was a house in the parish of *T.*:—*Held*, sufficient. *Rex v. Pearson*, *T.* 10 *G.* 4. 520
11. An indictment charging that *A.* and others, on &c., at &c., to the number of three together, did by night unlawfully enter divers closes, and were *then and there* in the said closes, armed with guns, for the purpose of destroying game, does not sufficiently allege that the defendants were *by night* in the closes, armed for the purpose of destroying game. *Darics v. The King*, *M.* 10 *G.* 4. 562

## INDICTMENT, COPY OF.

Where a party suing for a malicious prosecution had obtained a copy of the indictment, by virtue of the Attorney General's fiat, procured upon a mis-statement of the view entertained by the judge before whom the indictment was tried, the Court refused to stay the proceedings, or to prevent the plaintiff from using on the trial the copy so obtained. *Browne v. Cumming*, *M.* 10 *G.* 4. 614

## JURISDICTION.

See JUSTICES, 3, 4.—SETTLEMENT, *by hiring and service*, 1, 2.—SMUGGLING.

## JUSTICES.

See COMMITMENT.—EVIDENCE, 4, 5, 15, 16.—GAME.—HIGHWAYS.—NOTICE OF ACTION, 2, 3, 5, 6.—PRACTICE.—SMUGGLING.

1. A magistrate should not allow depositions to be framed in the words of a clause in a statute under which a party is committed. *Mills v. Collett*, H. 9 & 10 G. 4. Page 262
2. Where a party was charged on oath before a magistrate, under 7 & 8 G. 4, c. 30, s. 19, with having maliciously cut down a tree adjoining a dwelling-house, and was committed as a felon, and the informer did not prosecute:—*Held*, that the committing magistrate was not liable in trespass, although it appeared on the face of the depositions under which the party was committed, that he was the occupier of the land on which the tree grew. *Id. Ibid.*
3. A contract to weave goods at the house of the weaver, is not a contract to serve within 4 G. 4, c. 34, s. 3, so as to give jurisdiction to a magistrate to commit the weaver "for neglecting his work after commencing upon the same." *Hardy v. Ryle*, H. 9 & 10 G. 4. 301
4. An action for false imprisonment against a magistrate may, under 24 G. 2, c. 44, s. 8, be commenced on the 14th of June, when the plaintiff is discharged out of custody on the 14th of December. *Id. Ibid.*
5. Where a magistrate, upon whose property a malicious trespass had been committed, issued a summons requiring the offender to appear before himself, or some other magistrate, and purporting that information had been given to him, the magistrate, on oath; whereas no oath had been taken, and the information had been communicated by the magistrate to the informer; the Court, in discharging

a rule for a criminal information against the magistrate, refused to give him his costs. *Rex v. Whateley*, E. 10 G. 4. Page 313

## LIBEL.

See EVIDENCE, 2, 6.

## LORD OF MANOR.

See COPYHOLDER.—DESCENT.

## MALICIOUS INJURY.

See JUSTICES, 2, 5.—NOTICE OF ACTION, 1, 3.

1. Where shrubs are cut, upon an unproved allegation that they were likely to be injurious to an adjoining wall, the case is within the malicious injuries act, though the title to the spot on which the shrubs grew be in dispute between the parties. *Rex v. Whateley*, E. 10 G. 4. 313
2. To justify the apprehension of an offender under the malicious injuries act, 7 & 8 G. 4, c. 30, the offender must be taken in the fact, or on a quick pursuit. *Hanway v. Boulbee*, T. 10 G. 4. 481
3. The owner of sheep in a field which had been worried by a dog, shot the dog when in another field at some distance off:—*Held*, in an action by the owner of the dog, that the defendant was not justified in the act of shooting, as it was not done in protection of his property. *Wells v. Head*, T. 10 G. 4. 517

## MANDAMUS.

See COPYHOLDER, 2.

Where a mandamus to admit a churchwarden, recites, that the party was duly nominated, elected and chosen, "not duly elected," is a good return. *Rex v. Williams*, M. 9 G. 4. 32

## NOTICE OF ACTION.

### MANOR.

See COPYHOLDER.—DESCENT.

### MASTER AND SERVANT.

See COVENANT, 1.—HAWKERS AND PEDLARS, 1.—POST OFFICE, 1.

1. To justify a master in discharging a yearly servant before the expiration of the year, there must be, on the part of the servant, either moral misconduct, pecuniary or otherwise, wilful disobedience, or habitual neglect. *Callo v. Brounker*, T. 10 G. 4. Page 502
2. A trader, concealing smuggled goods, is liable for the act of his servant in protecting such goods, though done in his absence. *Attorney-General v. Siddon*, T. 10 G. 4. 533

### NAVIGABLE RIVER.

See POOR RATE, 1, 2.—RATABLE OCCUPIERS.—TITHES, 2.

## NOTICE OF ACTION.

1. Plaintiff, a surveyor, being occupied in making a road over common lands belonging to a township; defendant, as fen-reeve, or person having the care of such lands, asked plaintiff by whose authority he acted; to which plaintiff replied, that he was ordered to make the road by a magistrate: defendant then told plaintiff, that if he did not desist, he should consider him as a wilful trespasser; and as plaintiff still continued the work, and did not shew any order or warrant authorising him to make the road, defendant caused him to be apprehended and taken before a magistrate, who refused to receive the complaint; on which plaintiff brought trespass against defendant for an assault and false

## NOTICE OF APPEAL. 647

- imprisonment:—*Held*, that defendant was entitled to notice of action, under the 7 & 8 Geo. 4, c. 30, s. 41, as he had reason to suppose that he was acting under colour of that statute, in causing plaintiff to be apprehended, although he was not in fact committing a wilful or malicious injury at the time. *Wright v. Wales*, H. 9 & 10 G. 4. Page 250
2. In a notice of action to a magistrate the residence of the plaintiff's attorney was described as Half-Moon Street, Piccadilly, London. *Quere*, whether it was sufficient, Half-Moon Street being in the county of Middlesex. *Mills v. Collett*, H. 9 & 10 G. 4. 262
  3. Notice of action against justices served 15th May; latitat issued 15th June. *Quere*, whether issued too soon. *Anonymous*, H. 9 & 10 G. 4. 307 (a).
  4. The owner of property arresting a person, in the bona fide belief that he was acting in pursuance of 7 & 8 G. 4, c. 30, s. 28, is entitled to the notice of action required by s. 41 of that statute. *Beechey v. Sides*, T. 10 G. 4. 365
  5. Notice of action against a magistrate, under 24 G. 2, c. 44, is sufficient to warrant a writ and proceedings against him and a constable jointly. *Jones v. Simpson*, T. 10 G. 4. 527
  6. Notice was given to a magistrate as above, and a writ sued out against him alone, which the plaintiff afterwards abandoned, and sued out another against the magistrate and constable jointly:—*Held*, that the notice was sufficient to warrant the second writ and proceedings thereon. *Id.* *Ibid.*

## NOTICE OF APPEAL.

See APPEAL.

## OFFICE.

*See* ASSISTANT OVERSEER.—OVERSEER.—QUO WARRANTO.—SETTLEMENT BY OFFICE.

The common clerk of a borough is appointed by the mayor, *aldermen*, and bailiffs, removable at their pleasure, and with a salary variable at their pleasure; and it is his duty to attend the corporate meetings and take minutes of the proceedings. The office of such common clerk and that of alderman are incompatible, and the acceptance of the former vacates the latter. *Rex v. Tizzard, E. 10 G. 4.*

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## OVERSEER.

*See* ASSAULT.—ASSISTANT OVERSEER.—COVENANT, 1.—EVIDENCE, 8.—SELECT VESTRY, 2.

A writ of privilege granted to exempt the deputy to the clerk of the treasury of the Court of C. P. from serving the office of overseer. *Ex parte Jefferies, T. 10 G. 4. 463*

## PLEADING.

*See* ASSISTANT OVERSEER, 2.—INDICTMENT.

## POACHING.

*See* INDICTMENT, 11.

## POLICE.

*See* CONSTABLE, 2.

## POOR RATE.

*See* APPEAL.—ASSISTANT OVERSEER.—CANALS.—RATABLE OCCUPIERS.—TITHES, 1.—TOLLS.

1. An act of parliament authorised certain persons to make and maintain the river Avon navigable, to scour the river, to make new cuts through lands adjoining, and to build locks, first making satisfac-

tion to the owners of lands. The act then appointed commissioners for settling and apportioning such satisfaction; and then empowered the undertakers to take certain tolls. The undertakers made the river navigable, and scoured and cleansed it from time to time, and made a cut and lock for the purposes of the navigation, on land purchased by them:—*Held*, that they were not the occupiers of the river Avon, and not ratable in respect of it as land covered with water; but that they were ratable in respect of the cut and lock made on their own land. *Rex v. Avon Company, H. 9 & 10 G. 4. Page 91*

2. Certain persons, under the authority of an act of parliament, make navigable, clear, cleanse, scour, open, enlarge and straighten, a river, dig and cut banks, erect weirs, locks and dams, make new cuts and trenches through lands adjoining, which they purchase, and make towing paths over land partly purchased and partly rented by them: *Held*, that they are not ratable as occupiers of the river or of the land taken for the purposes of the navigation, but that they are ratable for the new cuts and trenches, and for the weirs, locks and dams, erected on their own land. *Rex v. Mersey and Irwell Company, H. 9 & 10 G. 4. 106*

3. The poor rate in respect of the occupation of land should be assessed with reference to the sum for which the land would let, not upon the net produce. *Rex v. Bridgewater, Duke of, Trustees of, H. 9 & 10 G. 4. 139*

4. The possessors of canal property consisting of the canal, towing-path, and warehouses and offices adjacent, are to be assessed upon the same principle as the occupiers of land. *Id. d.*

## POST OFFICE.

5. The objects of a charitable foundation, in the actual occupation of alms-houses, living rent-free, and liable to be removed at the will of the patrons, are beneficial occupiers, within the meaning of 43 *Eliz. c. 2, s. 1*, and liable to be rated for the relief of the poor. *Rex v. Green, H. 9 & 10 G. 4.*

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6. A poor rate imposed in respect of two-thirds of the net rent of farms, lands and tithes, and of one half of the net rent of houses and other buildings, collieries, and coal-mines, is not necessarily unequal. *Rex v. Tomlinson, H. 9 & 10 G. 4.* 164
7. The lessee and occupier of a coal-mine is ratable for the full annual value of the mine though increased by improvements made at his expense. *Rex v. Granville, Lord, H. 9 & 10 G. 4.* 167

## POST OFFICE.

See INDICTMENT, 10.

1. A person employed at a receiving house of the General Post Office, to clean boots, &c. and to assist in tying up the letter bag, is not a servant of the Post Office, within 52 *G. 3, c. 143, s. 2.* *Rex v. Pearson, T. 10 G. 4.* 520
2. A receiving house is not a *post office*, within that statute, but it is "a place for the receipt of letters;" and the whole shop is to be considered as the "place for the receipt of letters," and not the mere letter box; and therefore, if a person take a letter and put it on the shop counter of the receiving house, or give it to one of the persons belonging to the shop there, that is putting the letter into the post. *Id.* *Ibid.*
3. To constitute the offence of stealing a letter from a place for the receipt of letters under s. 3 of the act, it is essential that the letter

## RATABLE OCCUPIERS. 649

should be carried out of the shop which was the place for the receipt of letters; and therefore, if a person take a letter and steal its contents, without taking the letter out of the shop, that is not an offence within the statute. *Rex v. Pearson, T. 10 G. 4.* 520

## PRACTICE.

See APPEAL. — COUNSEL. — EVIDENCE, 15, 16.—JUSTICES, 1.

1. It is unnecessary to enter and despite an appeal, where the order of removal is served too late to try at the next sessions. *Rex v. Kent, Justices of, M. 9 G. 4.* 11
2. Parish officers ought to be allowed a reasonable time after the service of the order of removal, to consider whether they will appeal or not. *Id.* *Ibid.*
3. Where an order of removal is served so late that an appeal cannot be tried at the next sessions, it is not necessary that an appeal should be entered at those sessions. *Rex v. Devon, Justices of, H. 9 & 10 G. 4.* 124

## PROBABLE CAUSE.

See CONSTABLE, 1.—NOTICE OF ACTION, 1.

## QUO WARRANTO.

See OFFICE.

On a motion for a quo warranto information against a corporator, on the ground of the acceptance of an incompatible office, the relator must shew a *legal* appointment to the second office. *Rex v. Day, T. 10 G. 4.* 391

## RATABLE OCCUPIERS.

See CANALS.—POOR RATE.—TITHES, 1.—TOLLS.

An act of parliament empowered

certain undertakers to make navigable a river, and for that purpose to scour and cleanse the river and to dig and cut the banks. Another act recited that the legal estate and interest in the navigation of the same river, and in certain lands and buildings, was vested in trustees, whom it empowered to sell and convey in fee the said lands and buildings, and to mortgage in fee the said navigation and the said lands and buildings:—*Held*, that neither of these acts vested the soil of the bed of the river in the undertakers, and, therefore, that they were not ratable to the poor as the owners or occupiers of the river. *Rex v. Aire & Calder Navigation*, T. 10 G. 4. Page 442

#### RECORD OF ACQUITTAL.

See INDICTMENT, COPY OF.

*Semble*, that every indietee is entitled, as of right, to a copy of the record of his acquittal. *Browne v. Cumming*, M. 10 G. 4. 614

#### RELIEF.

See EVIDENCE, 7.

#### RIOT.

1. If, in reading the proclamation from the Riot Act, the magistrate omit to read the words "God save the King" at the end of it, persons remaining together an hour after such reading of the proclamation cannot be capitally convicted under s. 1 of that act. *Rex v. Child*, T. 10 G. 4. 493
2. Persons who are present at a prize fight, and have gone thither for the purpose of seeing the combatants strike each other, are all principals in the breach of the peace, and indictable for an assault, as well as the combatants; and it is immaterial which of the combatants struck the first blow. *Rex v. Perkins*, T. 10 G. 4. 506

#### SETTLEMENT.

##### SELECT VESTRY.

1. To constitute a valid assembly of a select vestry appointed under 58 G. 3, c. 45, & 59 G. 3, c. 134, a majority of the whole number appointed should be present. *Blacket v. Blizzard*, T. 10 G. 4. Page 369
2. Trespass for an assault. Plea, that defendants were overseers of the poor, and that a select vestry of the parish *was duly assembled*, at which defendants, as overseers, were present; that plaintiff unlawfully entered, and defendants expelled him. Proof, that one of the members constituting the select vestry, had not been summoned to the meeting:—*Held*, that the plea was not proved, as the meeting was not a legally constituted vestry, so as to support the allegation that the select vestry was *duly assembled*. *Dobson v. Fussey*, T. 10 G. 4. 470

#### SESSIONS.

See PRACTICE.

#### SETTLEMENT, by Apprenticeship.

1. Where money is advanced by overseers to an infant about to be apprenticed, for the purpose of providing her with clothes, the indenture is void unless approved of by two justices, under 56 G. 3, c. 139. *Rex v. Mattishall, Inhabitants of*, M. 9 G. 4. 29
2. An undertaking by the mother of an apprentice, without the knowledge of her husband, to pay the master a sum of money beyond the premium inserted in the indenture and paid by the husband at the time of its execution, (the stamp on the indenture being sufficient for both sums,) does not make the indenture void under 8 Ann. c. 9, s. 39; the undertaking being void,

## SETTLEMENT.

and no fraud being practised on the revenue. *Rex v. Bourton, Inhabitants of*, T. 10 G. 4. Page 361

3. An indenture of apprenticeship to which parish officers are parties, is valid if allowed by two justices under their *hands only*, though expense be incurred, *but not clandestinely*, by the parish funds, under 56 G. 3, c. 139, ss. 1 to 10. *Rex v. St. Paul, Exeter, Inhabitants of*, M. 10 G. 4. 581
4. S. 11 of that act, which requires an allowance by two justices under their hands *and seals*, applies only to cases where expense is incurred by the parish funds, the parish officers not being parties to the indenture. *Id.* *Ibid.*

### SETTLEMENT, by Birth.

A single woman, settled in *A.*, was removed from *B.* to *C.* The order of removal was quashed on appeal, but she had been previously delivered of a bastard child in *C.* :—*Held*, that the child was not settled in *A.* *Rex v. Martlesham, Inhabitants of*, M. 10 G. 4. 567

### SETTLEMENT, by Estate.

1. To gain a settlement by estate, the party must have an estate in possession. *Rex v. Ringstead, Inhabitants of*, H. 9 & 10 G. 4. 71
2. Messuage *A.* was devised to *M.*, durante viduitate, and after her decease or re-marriage, *A.*, and also messuage *B.*, of which the testator made no other disposition, were devised to *N.*, who was not heir of the devisor, in fee :—*Held*, that *N.* took no estate in *A.* or *B.* till after the death or marriage of *M.*, during whose widowhood *B.* descended to the heir of the devisor; and that, therefore, *N.* gained no settlement by residing in the parish where the

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messuages were situate, while *M.* continued alive and unmarried. *Rex v. Ringstead, Inhabitants of*, H. 9 & 10 G. 4. Page 71

3. An estate in remainder, though vested, will not confer a settlement. *Rex v. Willoughby-with-Sloothby, Inhabitants of*, M. 10 G. 4. 545
4. A burgess receiving, by the allotment of the burgesses, a portion of the rent of lands held by the borough, does not gain a settlement by estate. *Rex v. Belford, Inhabitants of*, M. 10 G. 4. 608

### SETTLEMENT, by Hiring and Service.

#### See DISPENSATION.

1. When the Quarter Sessions confirm an order of removal, the validity of which turns upon a question of fact, that fact must be taken to have been found, although the evidence of the fact be not stated in a case reserved; and this Court will not disturb such finding if there were any evidence from which the fact might be inferred. *Rex v. St. Andrew, Cambridge, Inhabitants of*, M. 9 G. 4. 19
2. *A.*, an innkeeper, said to *B.* "I have a lad coming in a fortnight, but you may stay till he comes." *B.* was to have board, lodging, and vails. The other lad came but did not remain. *B.* continued in the service three years without any thing further passing. The Court of Quarter Sessions are at liberty to infer a general hiring. *Rex v. St. Martin, Leicester, Inhabitants of*, M. 9 G. 4. 22
3. "Let him stop what time he will, I will give him satisfaction, if not in money in clothes." The sessions are at liberty to infer that this was not a general hiring. *Rex v. Rosliston, Inhabitants of*, M. 9 G. 4. 37

4. An act for draining fen lands vests 5000 acres in trustees, as a recompense for the undertakers, and directs that inhabitants upon any part of the 5000 acres, unable to maintain themselves, shall be maintained by the trustees, and not by the parishes. The 5000 acres become an incorporated district, but are not rendered extra-parochial; and hiring and service thereon confers a settlement, where the service is performed either in the particular parish or in the district generally. *Rex v. Croyland, Inhabitants of, M. 9 G. 4.* Page 40
5. A pauper hired herself under a written agreement to work in a factory for four years at weekly wages, and "to observe all the rules with regard to the hours of attendance and of work." The rules were not reduced into writing, and were occasionally varied by the master, but the pauper was told that she must work twelve hours a day:—*Held*, first, that this was not an exceptive hiring, and that due service under it conferred a settlement; and, secondly, that the parol communication made to the pauper was not admissible evidence to explain the written agreement. *Rex v. St. John, Devizes, Inhabitants of, T. 10 G. 4.* 397
6. A pauper was hired "for a year, at 4s. 6d. a week, to work from six in the morning till seven in the evening, and to make as much overwork as he chose:—"*Held*, an exceptive hiring, service under which conferred no settlement. *Rex v. Birmingham, Inhabitants of, T. 10 G. 4.* 402
7. A local militia-man hired himself to serve for a year, without disclosing to his master the fact that he was in the militia:—*Held*, that this was not a lawful hiring within 3 *W. & M. c. 11, s. 7*, the servant not be-

- ing *sui juris*, or capable of so hiring himself, notwithstanding the provisions of 48 *G. 3, c. 111, ss. 15 & 24*, the local militia act in force at the time. *Rex v. Taunton St. James, Inhabitants of, T. 10 G. 4.* Page 406
8. An adult contracts to serve a plumber as an articulated servant for four years, to learn his trade, at weekly wages; to be considered as an out-door apprentice; to do gardening or any other work his master sets him about; and, when ill, not to receive wages; the master agreeing to teach him his trade. This is not a contract of hiring and service, but an imperfect contract of apprenticeship, service under which confers no settlement. *Rex v. Tipton, Inhabitants of, T. 10 G. 4.* 415
9. Where, upon a yearly hiring from the 13th of May, the following 12th of May is excluded from the service by a dissolution of the contract, no settlement is gained, although the service continue 365 days, by reason of its being leap-year. *Rex v. Roxley, Inhabitants of, M. 10 G. 4.* 554

## SETTLEMENT, by Office.

1. The office of assistant overseer, under 59 *G. 3, c. 12*, is a public annual office, within 3 & 4 *W. & M. c. 11, s. 6*. *Rex v. Lew, Inhabitants of, M. 9 G. 4.* 12
2. If a salary be annexed to the office, the appointment requires a stamp under 55 *G. 3, c. 184*; and service of the office for a year under an unstamped appointment confers no settlement. *Id. Ibid.*

## SETTLEMENT, by Payment of Rates.

Payment of watch rate in London does not confer a settlement. *Rex v. St. Ann, Blackfriars, Inhabitants of, M. 9 G. 4.* 26



## SMUGGLING.

### SETTLEMENT, *by renting a Tenement.*

*See EVIDENCE, 1.*

1. Under 6 G. 4, c. 57, a pauper renting a dwelling-house for a year at the yearly rent of 10*l.*, paying rent for a year, and residing forty days, but underletting part of it, is the "occupier," and thereby acquires a settlement. *Rex v. Ditcheat, Inhabitants of, H. 9 & 10 G. 4.*

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2. It is not necessary, in establishing a settlement under 59 G. 3, c. 50, to prove that the tenement is of the actual value of 10*l.* a year; it is sufficient if it be proved to have been *bonâ fide* hired at that sum. *Rex v. Ashfield-cum-Thorpe, Inhabitants of, T. 10 G. 4.*

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## SEWERS RATE.

Where a district, within one commission of sewers, is divided into separate levels, each drained by a separate line of sewers, and deriving no benefit from the sewers in the others, each level must be separately rated: *Rex v. Tower Hamlets, Commissioners of, E. 10 G. 4.*

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## SMUGGLING.

*See MASTER AND SERVANT, 2.*

1. A vessel liable to forfeiture under 6 G. 4, c. 108, s. 3, was seized while entering the harbour of *A.*, but within the jurisdiction of the justices of *B.* A person liable to apprehension under s. 49, being found on board, was arrested there, and carried to *A.*, and convicted by two justices of that place under s. 74:—*Held*, first, that said person was, in the absence of evidence as to the time of his going on board, properly convicted, as having been on board *on the high seas*;

## STATUTES.

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and secondly, that the justices of *A.* had jurisdiction. *Rex v. Nunn, M. 9 G. 4.*

*Page 1*

## SPRING GUNS.

Defendant set a spring-gun in his garden, at some distance from his dwelling-house, of which he gave no notice. Plaintiff entered the garden in pursuit of a strayed fowl, and, coming in contact with one of the wires, was wounded by the discharge of the gun:—*Held*, that plaintiff was entitled to recover damages for the injury in an action on the case. *Bird v. Holbrook, H. 9 & 10 G. 4.*

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## STAMP.

*See SETTLEMENT, by Apprenticeship, 2.—SETTLEMENT, by Office, 2.*

## STATUTES, CITED OR COMMENTED UPON.

*Henry 6.*

8. c. 9. Forcible Entry. *340*

*Elizabeth.*

43. c. 2. s. 1. Poor Rates. *158*

*James 1.*

21. c. 15. Forcible Entry. *340*

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3. c. 11. s. 7. Settlement by hiring and service. *406*

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 10. c. 44. s. 7. Police Constables. 498

## THRESHING MACHINES.

*See FELONY, 2, 3.*

## TITHES.

*See POOR RATE, 6.*

1. The owner of tithes which are retained by the occupier of the land under composition from year to

## TURNPIKE ROADS.

year, is ratable to the repair of the highways as occupier of tithes. *Chanter v. Glubb, E. 10 G. 4.*

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2. Under a clause in an act giving compensation for the value of lands, tenements, and hereditaments, or for damage done thereto, the tithe owner is not entitled to compensation for the injury done to him by the conversion of titable land taken for the purpose of the navigation, and covered with water. *Rex v. Nene Outfall, Commissioners of, T. 10 G. 4.* 375

## TOLLS.

*See POOR RATE, 1.*

The tolls payable for passing through locks belonging to a canal company, are ratable to the poor wholly in the parish in which the locks are situate. *Rex v. Lower Milton, Inhabitants of, T. 10 G. 4.* 424

## TREES.

*See JUSTICES, 2.—MALICIOUS INJURY.*

## TRESPASS.

*See COMMITMENT.—JUSTICES, 2.*

## TRUSTEES.

*See HIGHWAYS, 6.—TURNPIKE ROADS.*

## TURNPIKE ROADS.

*See HIGHWAYS, 6.*

Where, upon the diversion of a turnpike road, after the new road had been completed, but before the old road was stopped up, the trustees, by permission of *B.*, broke down his fence to make a passage from the new road to the close of *A.*, but did not put up a gate or fence to protect the latter close:—*Held,*

**VENUE.**

that the trustees were wrong doers,  
and that *B.* was responsible for  
their acts. *Winter v. Charter, H.*  
9 & 10 G. 4. *Page 177*

**VARIANCE.**

*See* INDICTMENT, 1, 3.—SELECT  
VESTRY, 2.

**VENUE.**

*See* INDICTMENT, 5.

**WRIT OF PRIVILEGE. 655**

**VESTRY.**

*See* SELECT VESTRY.

**WITNESS.**

*See* FORCIBLE ENTRY, 1.

**WRIT OF PRIVILEGE.**

*See* OVERSEER.

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